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Magna Carta and the *ius commune*

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The English Magna Carta (1215) has long stood as a symbol of human liberty and the rule of law. This Article investigates its intellectual origins, suggesting the existence of possible influence on the Charter by the contemporary ius commune, the amalgam of Roman and canon laws that had emerged in consequence of the revival of legal studies on the Continent in the twelfth century. Comparing the substance of over half of the chapters with the contemporary ius commune, the Article demonstrates that many similarities existed. Accepting the possibility of use of Continental sources in drafting the Charter helps explain otherwise puzzling features in it. It also accords with common patterns in legal development at the time.

INTRODUCTION

The subject of this inquiry is not unexplored territory. Far from it. Indeed writing about Magna Carta at all requires a measure of presumption. Certainly it does if the writer pretends to have something new to say about the topic. Hundreds of books and articles already have been devoted to it.¹ The Charter is widely familiar among educated men and women as the most famous concession of legal rights made by the English king to his subjects. The events that led up to it are also widely known. By the latter part of his reign, King John had lost the confidence of

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¹ See generally David V. Stivison, ed, *Magna Carta in America* (Gateway 1993) (containing an annotated bibliography on pp 118-81).

the great men of his kingdom. Habitual indifference to accepted standards of justice, reckless assertion of regalian rights over the church, extravagant military expenditures with little to show for them, and loss of the bulk of his continental possessions to the king of France at the Battle of Bouvines in 1214 had combined to sap their confidence in him. In the wake of this humiliating defeat and in the face of a rebellion coming from the north of England, Archbishop Stephen Langton, William Marshal, and a group of moderate barons sought to force John to establish rules that would set right what had been done wrong. They produced a list of grievances, some taken from a distant past, some seemingly based upon the Coronation Charter of Henry I, and some of more recent invention.² At Runnymede in June 1215, they compelled John to put his seal to a long list of concessions that would, they hoped, remedy the abuses that had occurred. If the king could be made to abide by them, peace in the realm might return and respect for the law might be restored.

A. The Charter's Reputation

In some ways, the lasting reputation of the events at Runnymede has always been something of a surprise. It can only be explained by the later history of Magna Carta, not by what it was in 1215. A distinguished modern historian has described the Charter as a "long and disorderly jumble," adding that it appears to be more a collection of "answers given by many persons to the question, 'What is being done wrong?' than it does a constitutional plan."³ Even William Blackstone, normally an enthusiast for the institutions of the common law, made similarly disparaging comments about the Charter's form and coverage.⁴ His opinion seems all too just. Magna Carta does not appear to have any logical arrangement, and many of its provisions do appear to be on the trivial side. This impression becomes all the stronger when

² See generally J.C. Holt, *The Making of Magna Carta* 217, and *Magna Carta and the Origins of Statute Law* 289, esp 292-300, in *Magna Carta and Medieval Government* (Hambledon 1985).

³ Samuel E. Thorne, *What Magna Carta Was*, in *The Great Charter: Four Essays on Magna Carta and the History of our Liberty* 3, 4 (Pantheon 1965). See also J.J. Bagley and P.B. Rowley, 1 *A Documentary History of England, 1066-1540* 98 (Penguin 1966) ("It was chiefly concerned with comparatively petty domestic matters.").

⁴ William Blackstone, 4 *Commentaries on the Laws of England* 416 (Oxford 4th ed 1770) ("[U]nless considered attentively and with this retrospect, they seem but of trifling concern."). See also John Reeves, 2 *History of the English Law, from the Time of the Romans to the End of the Reign of Elizabeth* 16 (W.F. Finlason, ed) (M. Murphy 1st Amer ed 1880) ("The whole is strung together in a disorderly manner, with very little regard to the subject-matter.").

one looks at an original copy of its run-on text and puts to one side its later and statutory forms, in which the text is always carefully divided into neat and distinct chapters.⁵

Despite its imperfections, Magna Carta survived. More than survive, it flourished. It outlasted the death of King John, annulment by Pope Innocent III, and revisions pruning the extent of the powers granted to the barons. It assumed first place in the book of English statutes, served as a touchstone of the liberties of the English nation during constitutional conflicts of later centuries,⁶ and came in time to stand as a symbol of the rule of law against tyranny by the state. The deficiencies of its initial form and the desuetude of many of its chapters came to seem less important than the spirit that was thought to infuse Magna Carta's provisions.

Even in our own day, it has not wholly lost its grip on legal imaginations. It is a rare collection of essays by a retired judge that does not contain some reference to Magna Carta.⁷ Its vitality remains especially strong in the United States. The number of chapters that survive in today's English statute book can be counted on the fingers of one hand,⁸ but across the Atlantic the Charter continues to be widely cited in judicial opinions for the great principles, and even some of the mundane details, it contains.⁹ It was used, for instance, to find roots for a constitutional

⁵ There is a reproduction of the original version sent to Lincoln in J.C. Holt, *Magna Carta*, plate no 8 (found between pp 234 and 235) (Cambridge 2d ed 1992).

⁶ See William H. Dunham, Jr., *Magna Carta and British Constitutionalism*, in *The Great Charter* 20 (cited in note 3); Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629* (Minnesota 1948); Maurice Ashley, *Magna Carta in the Seventeenth Century* (Virginia 1965); William F. Swindler, *Magna Carta: Legend and Legacy* (Bobbs-Merrill 1965).

⁷ See, for example, Lord Elwyn-Jones, *In My Time: An Autobiography* 303-05 (Weidenfeld & Nicolson 1983); Lord Denning, *The Family Story* 8 (Butterworths 1981); Lord Wright of Durley, *Legal Essays and Addresses* 67 (Cambridge 1939).

⁸ 10 *Halsbury's Statutes of England and Wales* 14-17 (Butterworths 4th ed 1995) (re-issue) (Andrew Davies, ed) (indicating only chs 1, 9, 29, and 37 from the 1297 statutory confirmation of Magna Carta remain). The *Cumulative Supplement, Halsbury's Statutes of England and Wales* 10/1 (Butterworths 4th ed 1997) (Andrew Davies, ed), indicates no later changes in the situation.

⁹ For example, *United States v Premises Known as RR # 1 Box 224, Dalton, Scott Township and North Abington Township, Lackawanna County, PA*, 14 F3d 864, 875, esp n 12 (3d Cir 1994) (noting that the Supreme Court finds the Magna Carta relevant to the question of proportionality in punishment); *United States v Real Property Located at Incline Village*, 976 F Supp 1321, 1359 (D Nev 1997) (finding Magna Carta relevant to the right to speedy and adequate justice); *First Federal Savings & Loan v Souto*, 162 Misc2d 224, 616 NYS2d 562, 564 (1994) (finding that the right of a tenant to adequate notice to quit premises is a due process right implied from the Charter); *Gladon v Greater Cleveland Regional Transit Authority*, 75 Ohio St 3d 312, 662 NE2d 287, 302 (Douglas dissenting) ("The right to trial by jury derives from Magna Carta."), reconsideration denied, 75 Ohio St 3d 1452, 663 NE2d 333 (1996). See generally A.E. Dick Howard, *The Road from*

“right to travel,”¹⁰ and within very recent memory a federal judge even thought it appropriate to cite Magna Carta as a precedent in Paula Jones’s suit against President Clinton.¹¹

B. Historians and the Charter

The antiquity, the continuing relevance, and the many puzzles presented by its chapters have made Magna Carta’s intellectual origins a natural topic for research. Investigation has been carried on in earnest since the seventeenth century, most notably by Sir Edward Coke.¹² He was not, however, the first—only the most influential—of the commentators on the Charter.¹³ He has also had many successors. Some commentary on the subject, particularly in our own day, has focused on the question of whether the Charter’s central provisions were “forward looking” in character, or were instead the product of a self-interested baronial agenda.¹⁴ Most investigators, however, have concentrated upon the narrower task of seeking to identify the Charter’s immediate intellectual sources. This Article also takes this approach, although it may also cast some faint light on questions of motivation. It makes the argument that the *ius commune*, the amalgam of the Roman and canon laws that governed legal education in

Runnymede: Magna Carta and Constitutionalism in America (Virginia 1968); David V. Stivison, *Magna Carta in American Law*, in Stivison, ed, *Magna Carta in America* 102 (cited in note 1).

¹⁰ See *Kent v Dulles*, 357 US 116, 125-26 (1958).

¹¹ See *Jones v Clinton*, 869 F Supp 690, 698 (E D Ark 1994) (stating that it seems consistent with the American form of government, Magna Carta, and the Petition of Right to hold that “even the sovereign is subject to God and the law”), *affd* in part, *revd* in part, 72 F3d 1354 (8th Cir 1996), *affd* as *Clinton v Jones*, 117 S Ct 1636, 1641 n 6 (1997) (citing the district court on this matter with apparent approbation).

¹² Edward Coke, 1 *The Second Part of the Institutes of the Laws of England* 1-78 (E&R Brooke 1st ed 1642, repr 1797). See also J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* 44-45 (Cambridge 1987) (reissue) and its index s.v. *Magna Carta* for other early investigators.

¹³ See the discussion in Charles Bémont, *Chartes des libertés anglaises (1100-1305)* xlviii-lxi (Macon 1892); Anne Pallister, *Magna Carta: The Heritage of Liberty* (Oxford 1971). See also several of the essays in Ellis Sandoz, ed, *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (Missouri 1993).

¹⁴ This controversy is well described in Helen M. Cam, *Magna Carta—Event or Document?* 5-8 (Selden Society Lecture 1965), and in Demetrios L. Kyriazis-Gouvelis, *Magna Carta: Palladium der Freiheiten oder feudales Stabilimentum* 32-40 (Duncker & Humblot 1984). See also F.M. Powicke, *Per Iudicium Parium vel per Legem Terrae*, in Henry Eliot Malden, ed, *Magna Carta Commemoration Essays* 96 (Royal Historical Society 1917), making an argument against the tendency to stress the purely feudal character of the Charter that is found *inter alia* in George B. Adams, *The Origin of the English Constitution* 207-74 (Yale 1912). For a slightly later treatment of the controversy, see Charles Petit-Dutaillis and Georges Lefebvre, *Studies and Notes Supplementary to Stubbs’ Constitutional History* 127-45 (Manchester 1930).

European universities and influenced legal practice in Europe from the twelfth century forward, played a role in the drafting of a significant number of the Charter's provisions.

No one has yet investigated in a systematic way the possibility of influence running from the *ius commune*. Some writers have taken a step in that direction by describing Magna Carta as having embodied widely accepted European ideals of its age,¹⁵ and occasionally scholars interested in the history of particular aspects of the canon law have remarked on the coincidence of their subject and the provisions of the Charter.¹⁶ But this has been about all.¹⁷ The two articles devoted to the Charter and the church, both with promising titles and both written by scholars of ability and distinction, turn out to say nothing about it. They deal only with the church's reaction to Magna Carta, not with the possibility that the law of the church played a role in its formulation.¹⁸ Similarly, Professor Walter Ullmann, whose great learning in the Roman and canon laws would have allowed him to assess the evidence in his discussion of Magna Carta's place in European history, did not address the possibility at all. It did not fit his "descending theory" of the canon law very well, and he appears simply to have accepted the conclusion of many other historians: that the Charter was a local and a feudal document.¹⁹

¹⁵ For example, John Maxcy Zane, *The Story of Law* 231 (Liberty Fund 2d ed 1998).

¹⁶ See, for example, Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarch with Augustinus Triumphus and the Publicists* 197-98, esp 198 n 2 (Cambridge 1963). See also notes 65, 139, and 228 and accompanying text.

¹⁷ I have excluded claims such as that found in Joseph T. Tinnelly, *Magna Charta—A Charter and an Ideal*, 3 Cath Law 337, 337 (1957) ("[I]t was Catholic in origin and it is Catholic in principle."); Arthur Hassall, *Magna Carta—The Church and English Freedom* 6 (Oxford House Papers No 6 1886) ("Never before and never since has the Church of England . . . come forward more distinctly as the champion of religion and liberty."). These claims are apologetic in purpose and depend more on assertion than an analysis of the evidence.

¹⁸ C.R. Cheney, *The Church and Magna Carta*, 68 Theology 266 (1965), reprinted in C.R. Cheney, *The Papacy and England 12th-14th Centuries* No XV (Variorum Reprints 1982); J.W. Gray, *The Church and Magna Carta in the Century after Runnymede*, 6 Hist Stud 23 (1968). See also H.G. Richardson and G.O. Sayles, *The Governance of Mediaeval England from Conquest to Magna Carta* 383-94 (Edinburgh 1963) (not mentioning the possibility in their treatment despite the expectations aroused by their title). This also proves to be true of the older treatments: Thaddaeus Lau, *Die Entstehungsgeschichte der Magna Charta* (Hoffman und Campe 1857); Faith Thompson, *The First Century of Magna Carta: Why It Persisted as a Document* 68-79 (Minnesota 1925).

¹⁹ Walter Ullmann, *Principles of Government and Politics in the Middle Ages* 164-79 (Methuen 2d ed 1966); Walter Ullmann, *The Individual and Society in the Middle Ages* 71-83 (Johns Hopkins 1966). I can only suppose that, because his interests were focused on larger political issues, particularly equating the absolutist aspect of Roman law with the position taken by King John, Professor Ullmann simply did not consider the possibility dealt with in this Article. He was in any event not much interested in the details of private law, which are the subject of most of the chapters in Magna Carta, and perhaps he

There has been only the slightest movement away from this approach in the most recent research on Magna Carta. The process of European integration has not yet laid its hand upon the subject. This is natural in a sense. By contrast with the laws of most European nations, where a reception of the Roman law is known to have occurred, the English common law has long been regarded as a "thoroughly native species."²⁰ Magna Carta is one example—albeit a particularly important example—of English law's exceptionalism. It is true that today's leading scholar on the Charter, Professor Sir James Holt, does raise the possibility of canonical influence on one or two of its provisions.²¹ A clerical hand is of course evident in the Charter's first chapter, which protects the liberty of the church. In it, the self-interest of the clerical order was most directly involved, and the presence of so many bishops among the barons made this guarantee natural. Canonical influence is also conceivable in assessing chapter 40, which promised that justice would not be sold. However, for Professor Holt that is about the end of it. Indeed in his most direct treatment of the subject, he inclines towards rejecting the notion that any significant influence on the Charter coming from the *ius commune* could have taken place.²²

Even opening the possibility of canonical influence, as Professor Holt has done, is altogether exceptional among historians of the Charter. Most investigators of the sources of Magna Carta have not felt it necessary to deal with the possibility at all. They have taken it for granted that the Charter either restated established principles of English law, or else embodied innovations hit

simply chose not to explore the subject.

²⁰ R.C. van Caenegem, *The Birth of the English Common Law* 110 (Cambridge 1973). See also Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* 165-74 (Harvard 1990).

²¹ Holt, *Magna Carta* at 285-86 (cited in note 5), speaking of Magna Carta's chapter 40: "Some clauses reveal an immediate canonical influence" (citing diocesan and provincial decrees to the same effect as the chapter). He adds, "Even here, however, the evidence is by no means certain." His subsequent discussion again seems to raise, but in the end to decide against, ascribing importance to the *ius commune* in the formulation of the Charter. Id at 291-96. See also his introduction to the collection of articles he edited, *Magna Carta and the Idea of Liberty* 2-3 (Krieger 1972, repr 1982), where he notes the partial influence on the Charter of ideas drawn from the scholastic culture of the time.

²² See Holt, *Magna Carta and the Origins of Statute Law* at 300-01 (cited in note 2) (stating that "[t]he influence exercised was not that of the canon law" and that "[t]he documents as a whole fail to reveal an increasing influx of concepts derived from canon law. Indeed the opposite is true"). The only reference to the canon law in the index to Professor Holt's collected articles on the subject is to this chapter. See Holt, *Magna Carta and Medieval Government* at 310 (cited in note 2). See also Holt, *The Origins of Magna Carta*, in *Magna Carta and Medieval Government* 123, 127 ("However, the Charter revealed little conscious inheritance from the studies of the canonists and civilians.").

upon by the baronial drafters in order to meet unprecedented problems. The barons were reacting against what they regarded as persistent violations of customary norms of behavior on the part of King John, and they found solutions to this dilemma either in English precedents or in their own ingenuity. In a general sense, this view claims a pedigree dating from at least the so-called Statute of Merton in 1254, in which the barons refused to overthrow the common law by accepting the canon law of legitimation by subsequent marriage.²³ In a specific sense, it can trace its origins to John Wycliff (d. 1384), who complained that his contemporaries were unduly neglecting the Great Charter in favor of the imperial and papal laws.²⁴ Its classic modern exposition is the fundamental study of the Charter's sources written by William McKechnie,²⁵ and it remains pervasive in more recent literature.²⁶

C. The *ius commune* in England in 1215

Despite the strength of this historiographical tradition, the possibility that the European *ius commune* exercised an immediate influence on the chapters of Magna Carta is not farfetched. The century or so before the events at Runnymede had witnessed a great period of growth in the study of the Roman and canon

²³ See F.W. Maitland, *Bracton's Note Book. A Collection of Cases Decided in the King's Courts During the Reign of Henry the Third* 104-17 (Rothman 1887, repr 1983).

²⁴ "It semeth that curatis schulden rathere lerne and teche the kyngis statutis, and namely the Grete Chartre, than the emperours lawe or myche part of the popis." John Wycliff, 3 *Select English Works* 327 (Oxford 1871) (Thomas Arnold, ed).

²⁵ William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (Maclehose 2d ed 1914).

²⁶ For example, Doris M. Stenton, *After Runnymede: Magna Carta in the Middle Ages* 7-9 (Virginia 1965). Other examples include John Hudson, *The Formation of the English Common Law: Law and Society in England from Norman Conquest to Magna Carta* 224-27 (Longman 1996); Ralph V. Turner, *King John* 225-49 (Longman 1994); Bryce Lyon, *A Constitutional and Legal History of Medieval England* 315-21 (Norton 2d ed 1980); Maurice Ashley, *The Life and Times of King John* 185 (Weidenfeld & Nicolson 1972); Richardson and Sayles, *The Governance of Mediaeval England* at 383-94 (cited in note 18); W.L. Warren, *King John* 232-40 (Eyre & Spottiswoode 1961); J.E.A. Jolliffe, *The Constitutional History of Medieval England: From the English Settlement to 1485* 246-63 (Adam & Charles Black 4th ed 1961); Theodore F.T. Plucknett, *A Concise History of the Common Law* 319 (Little, Brown 5th ed 1956); Austin Lane Poole, *From Domesday Book to Magna Carta: 1087-1216* 473-77 (Oxford 2d ed 1955); Sidney Painter, *The Reign of King John* 285-348 (Johns Hopkins 1949). The only exceptions known to me are Brian Tierney, *Religion and Rights: A Medieval Perspective*, 5 J L & Religion 163, 172-75 (1987) (treating the subject at a general level); R.C. van Caenegem, *An Historical Introduction to Private Law* 180-81 (Cambridge 1992) (D.E.L. Johnston, trans) (dealing with ch 9 of the Magna Carta and concluding, "It is a difficult question, which has hardly been studied"). For a consideration of some of the reasons for neglect of the *ius commune* in England, see Charles Donahue, Jr., *Why the History of Canon Law is Not Written* 10-16 (Selden Society 1986).

laws in England,²⁷ and the prestige of the learned laws was then at its peak. F.W. Maitland once wrote that in no other century "has so large a part of the sum total of intellectual endeavor been devoted to jurisprudence,"²⁸ and the endeavor of which they wrote was centered in the study of the two learned laws. By comparison with the impressive size and scope of the books of the canon and Roman laws, English common law would have cut a poor figure in the early thirteenth century. Whatever the situation later came to be, at the time the *ius commune* would have been hard to ignore in dealing with most basic legal questions.²⁹ In such a guarantee of fundamental rights, professedly granted in part *pro Deo* (ch 61), it would have seemed entirely appropriate to make some use of the law by which the church itself sought to live.

Reference to the *ius commune* as a source of law in England would not have been unprecedented. Writers of many kinds turned to it.³⁰ It is now acknowledged by historians that, despite the structural differences that were to give it an exceptional place in the history of Western Law, the English common law was touched by the hand of European law on several occasions and in several places. Particularly in the form it assumed in the hands of the medieval church, the *ius commune* sometimes brought together the legal regime of England and those that prevailed on the Continent.³¹ For example, the coronation oath of the kings,

²⁷ Details can be found in many works: Stephan Kuttner and Eleanor Rathbone, *Anglo-Norman Canonists of the Twelfth Century: An Introductory Study*, 7 *Traditio* 279 (1949-51); Charles Duggan, *Twelfth-century Decretal collections and their importance in English history* (London 1963); H.G. Richardson and G.O. Sayles, *Law and Legislation from Aethelberht to Magna Carta* 71-87 (Edinburgh 1966); Jane E. Sayers, *Papal Judges Delegate in the Province of Canterbury, 1198-1254: A Study in Ecclesiastical Jurisdiction and Administration* (Oxford 1971); Richard M. Fraher, *The Becket dispute and two decretist traditions: The Bolognese masters revisited and some new Anglo-Norman texts*, 4 *J Medieval Hist* 347 (1978); J.L. Barton, *The Study of Civil Law before 1380*, in J.I. Catto, ed, *The History of the University of Oxford: Vol. I, The Early Oxford Schools* 519 (Oxford 1984); Francis de Zulueta and Peter Stein, *The Teaching of Roman Law in England around 1200* (Selden Society 1990).

²⁸ Frederick Pollock and Frederic William Maitland, 1 *The History of English Law before the Time of Edward I* 111 (Cambridge 2d ed 1899).

²⁹ Thomas Edward Scrutton, *The Influence of the Roman Law on the Law of England* 70 (Cambridge 1885, Rothman repr 1985) (giving evidence to show that in England circa 1200, "the air was full of the Law of Rome"). See also Eleanor Rathbone, *Roman Law in the Anglo-Norman Realm*, 11 *Studia Gratiana* 255 (1967); Mary Cheney, *Possessio/proprietas in ecclesiastical courts in mid-twelfth-century England*, in George Garnett and John Hudson, eds, *Law and Government in Medieval England and Normandy: Essays in honour of Sir James Holt* 245, 253-54 (Cambridge 1994).

³⁰ For example, Maximilian Kerner, *Johannes von Salisbury und das gelehrte Recht*, in Peter Landau and Joers Mueller, eds, *Proceedings of the Ninth International Congress of Medieval Canon Law: Munich, 13-18 July 1992* 503 (Biblioteca Apostolica Vaticana 1997).

³¹ Knut Wolfgang Nörr, *The European Side of the English Law: A Few Comments from a Continental Historian*, in Helmut Coing and Knut Wolfgang Nörr, eds, *Englische und*

upon which historians have long recognized that the drafters of Magna Carta drew, was itself influenced by the Roman and canon laws.³² The words said to have been used on behalf of King John when he was new to the Crown in 1199 with the hope of enlisting the support of doubting barons were themselves taken directly from the Ulpian's definition of justice in the Digest.³³ The establishment in England of courts with an ordered system of supervisory jurisdiction owed something to the example of the law of the church.³⁴

Nor had private law, the subject of most of the Charter's provisions, been immune to influence from without. The formulation of the possessory assizes during the reign of Henry II, drawing in part on principles found in the *ius commune*, was one such instance. The example would have been remembered by some in 1215.³⁵ It is widely recognized today by historians of the subject that where the local law was incomplete or insufficient, English lawyers felt no shame in drawing upon the vast resources of the Roman and canon laws for inspiration. There continues to be controversy about how often this happened and about how important it was overall, but the existence of civilian influence at moments of need is doubted by almost no one. Such influence upon English law from outside continued to occur well into the modern era.³⁶

At no period, however, was the impulse and the need for this influence stronger than in the years around 1200.³⁷ These years

kontinentale Rechtsgeschichte: ein Forschungsprojekt 15 (Duncker & Humblot 1985).

³² H.G. Richardson, *The Coronation in Medieval England: The Evolution of the Office and the Oath*, 16 *Traditio* 111 (1960); Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100-1322* 415-33 (Princeton 1964).

³³ Dig. 1.1.10; see William Stubbs, ed, *Chronica: Magistri Rogeri de Houedene* 88 (51:4 Rolls Series 1871, Krause repr 1964) ("quod predictus Johannes Normannorum dux redderet unicuique illorum jus suum"). See generally R.W. Southern, *Medieval Humanism and Other Studies* (Basil Blackwell 1970).

³⁴ Susan Reynolds, *Kingdoms and Communities in Western Europe, 900-1300* 41-42 (Oxford 1984).

³⁵ See Donald W. Sutherland, *The Assize of Novel Disseisin* 20-24 (Oxford 1973); F. Joüon des Longrais, *La conception anglaise de la saisine du XIIe au XIVe siècle* (Recueil Sirey 1925). See generally Paul Brand, *The Origins of the English Legal Profession* 154-57 (Blackwell 1992); David J. Seipp, *The Reception of Canon Law and Civil Law in the Common Law Courts before 1600*, 13 *Oxford J Legal Stud* 388 (1993); J.H. Baker, *Review of R.H. Helmholz, Canon Law and the Law of England, (Hambledon 1987)*, 47 *Cambridge L J* 304 (1988); Brian Tierney, *Religion, law, and the growth of constitutional thought 1150-1650* (Cambridge 1982).

³⁶ See Mathias Reimann, ed, *The Reception of Continental Ideas in the Common Law World 1820-1920* (Duncker & Humblot 1993).

³⁷ See Paul Vinogradoff, *Roman Law in Medieval Europe* 97 (Oxford 2d ed 1929) (stating that, although Roman law "did not become a constituent element of English law," it nevertheless "exercised a potent influence on the formation of legal doctrines during the critical twelfth and thirteenth centuries, when the foundations of common law were laid").

provided a propitious moment from the perspective of the *ius commune*. It was being actively studied in England. Vacarius and others had brought the study of Roman law across the Channel. Law books from the Continent were beginning to appear in English libraries.³⁸ Gratian's *Decretum* was in regular circulation, and English churchmen and canonists were in the van in the systematic collection of papal decretals. There was no barrier between these developments in the *ius commune* and the world of the early English common law. It is even difficult to draw a strict line for this period between the common lawyers and the civilians or canonists, such as would come into existence by the end of the thirteenth century.³⁹ On the contrary, there were many points of connection. This Article explores the possibility that what was then a quite common pattern of influence also explains the drafting of significant parts of Magna Carta.

I. METHOD OF ANALYSIS

The analysis adopted in this exploration is simplicity itself. It takes appropriate chapters of Magna Carta in order and compares them with the *ius commune* as it stood in the early years of the thirteenth century. In drawing the comparisons, I have included references to the basic laws and canons of the Roman and canon laws, putting them in parentheses in the text and adding fuller references to other literature in the notes. The practice follows current scholarly usage.⁴⁰ My discussion of each chapter also

See generally de Zulueta and Stein, *The Teaching of Roman Law* at xxii-xliii (cited in note 27); David Ibbetson and Andrew Lewis, *The Roman law tradition*, in A.D.E. Lewis and D.J. Ibbetson, eds, *The Roman Law Tradition* 1, 8-10 (Cambridge 1994); Ralph V. Turner, *Roman Law in England before the Time of Bracton*, 15 J Brit Stud 1 (1975); R.C. van Caenegem, *Royal Writs in England from the Conquest to Glanvill: Studies in the Early History of the Common Law* 360-90 (77 Selden Society 1959).

³⁸ Pierre Legendre, *Miscellanea Britannica*, 15 Traditio 491 (1959).

³⁹ See Brand, *Origins of the English Legal Profession* at 154-57 (cited in note 35); Ralph V. Turner, *Clerical Judges in English Secular Courts: The Ideal versus the Reality*, in *Judges, Administrators and the Common Law in Angevin England* 159 (Hambledon 1994).

⁴⁰ These are standard abbreviations to the medieval texts and glosses:

Dist. 1 c. 1	<i>Decretum Gratiani</i> , Distinctio 1, canon 1
C. 1 q. 1 c. 1	-----, Causa 1, quaestio 1, canon 1
De pen.	-----, De penitencia
De cons.	-----, De consecratione
X 1.1.1	<i>Decretales Gregorii IX</i> , Book 1, tit. 1, cap. 1
Sext 1.1.1	<i>Liber Sextus</i> (of Boniface VIII), Book 1, tit. 1, cap. 1
1 Comp. 1.1.1	<i>Quinque compilationes antiquae</i> , Book 1, tit. 1, cap. 1 (from edition by A. Friedberg, Graz 1882)
d. a.	dictum ante (in <i>Decretum Gratiani</i>)

goes on to raise relevant problems and to suggest possible reasons, other than substantive similarity, for thinking that a connection can plausibly be made between the *ius commune* and Magna Carta.

A. Limitations in the Method

Before proceeding with the specifics of this comparison, however, I should venture a word of clarification. Perhaps it is a qualification. This Article is not advancing a claim that Magna Carta was simply cribbed from the canon or Roman laws. Nor does it argue that every chapter of the Charter was fully in accord with the contemporary canon (or still less Roman) laws. Some parts of the Charter were undoubtedly innovations, and, as Professor Holt has argued quite convincingly, the drafters felt themselves quite capable of picking and choosing from among the material at their disposal. Holding this attitude—a quite normal one in the world of European law at the time—they would have felt little hesitation in ignoring, modifying, or rejecting rules from the *ius commune* where they did not fit local conditions or needs.⁴¹

A particularly clear example of this process, one that illustrates both the possibility of acceptance and rejection of parts of the *ius commune*, comes from one of the Charter's antecedents. The Articles of the Barons, which were compiled just before the events at Runnymede, had used the phrase *appellatione remota* in seeking to establish a new remedy against disseisins by the king.⁴² The phrase was an import from the canon law (X 2.28.53),⁴³ used in the context of appointment of papal judges delegate as a way of providing immediate redress for those whose

d. p.	dictum post (in <i>Decretum Gratiani</i>)
gl. ord.	<i>glossa ordinaria</i> (standard commentary on texts of <i>Corpus iuris canonici</i> and <i>Corpus iuris civilis</i>)
s.v.	<i>sub verbo</i> (reference to <i>glossa ordinaria</i> or other commentary on a legal text)
Dig. 1.1.1.1	<i>Digestum Justiniani</i> , Book 1, tit. 1, lex 1, § 1
Cod. 1.1.1	<i>Codex Justiniani</i> , Book 1, tit. 1, lex 1
Inst. 1.1.1	<i>Institutiones Justiniani</i> , Book 1, tit. 1, lex 1
Nov. 1.1.1	<i>Novellae</i> 1, lex 1 (in <i>Corpus iuris civilis</i>), § 1

References to the medieval *glossa ordinaria* for the canon law are taken from a copy of the *Decretum Gratiani* printed in Venice in 1615 and from a copy of the *Decretales Gregorii IX* printed in Lyons in 1556. For the Roman law and its glosses, citations are made to a copy of the *Corpus iuris civilis* published in Venice in 1506.

⁴¹ See van Caenegem, *The Birth* at 100-02 (cited in note 20).

⁴² Holt, *Magna Carta* at 435, ch 25 (cited in note 5).

⁴³ (= 3 Comp. 2.19.11). See also Peter Herde, 2 *Audientia litterarum contradictarum. Untersuchungen über die päpstlichen Justizbriefe und die päpstliche Delegationsgerichtsbarkeit vom 13. bis zum Beginn des 16. Jahrhunderts* 805 (Max Niemeyer 1970).

property had been taken away by force. It restrained the right of the forceful takers of the property to lodge an appeal to the papal court and thereby delay justice. The basic idea was undeniably attractive. However, use of the term made little sense in a common law setting, because in 1215 the common law knew no system of appeals in the canonical or the modern form. The phrase was quite sensibly dropped from the text of Magna Carta itself.⁴⁴ The example shows both that the *ius commune* was one of the options for framing new laws and that it occupied no unassailable position. It could be used. It could also be set aside. The Great Charter and its renewals followed that same pattern.

B. Exclusions from Coverage

As the example of the canonical appeal shows, in many of their parts the Roman and canon laws would have had little relevance to the needs of the moment in 1215. It is only to be expected, therefore, that an inquiry should not enter into a discussion of those provisions of Magna Carta where no connection could have been made with the contemporary *ius commune*. The consequent exclusions in coverage fall (roughly) into one of three categories.

First, some of the provisions in the Charter stated rules familiar in most, if not all, developed systems of law. For instance, a rule that innovations that upset long established laws and customs should be adopted with hesitation, as in the creation of new forests in the king's favor noted in chapter 47, stated an assumption that was common in medieval thought. The *ius commune* did contain similar provisions. They were guarantees of settled expectations. But then, so did precedents drawn from existing English law. The sentiment would have been shared by most men at the time. Much the same can be said of chapter 62, which provided for the pardon of "all trespasses committed in the said quarrel." Attributing any special role to the *ius commune* because of the inclusion of such settlements in Magna Carta seems quite unnecessary, and only incidental attention is paid to them in what follows.

Second, a few of the Charter's provisions dealt with purely local and temporary conditions, or related simply to execution of the agreement reached between the king and the barons.⁴⁵ These

⁴⁴ This was done in converting chapter 25 of the Articles into chapters 52 and 53 of Magna Carta. See Holt, *Magna Carta* at 286-87, 435 (cited in note 5).

⁴⁵ See Petit-Dutaillis and Lefebvre, *Supplementary to Stubbs' Constitutional History* at 136 (cited in note 14) (counting fourteen of these).

provisions could have had only the most tenuous connections with texts or ideas taken from the Roman and canon laws. Removal of all relatives of Gerard of Athée from the king's bailiwicks (ch 50), and restoration of the son of Llywellyn and the Welsh hostages (ch 58), are two obvious examples. It would be foolish to look for the *ius commune* (or any formal system of law) behind details like these. An impulse to do justice may have given rise to them, but there need have been no specific connection to any formal system of law. These provisions grew out of personal and special problems—part of the settlement of the kind of details that arise out of any armed conflict. For this reason, they have been excluded in what follows.

Third, some chapters in Magna Carta were statements of the king's intent to restore, or at least to abide by, long-standing customs of the realm. Safeguarding the "ancient liberties and free customs" of London (ch 13), and taking only the "ancient relief" owed at the time of the death of a tenant in chief (ch 2), were two such measures. Probably chapter 34, which promised to check the use of the writ *praecipe* and thereby protect the jurisdiction of the courts of lords from diminution at the hands of the king, belongs to the same group that was intended to restore the usages of the past.⁴⁶

The *ius commune* was not in principle hostile to the preservation of immemorial or feudal customs of this sort.⁴⁷ Except for special cases, it was not "anti-feudal" in intent. The *Libri feudorum*, the collection of feudal law texts compiled in Bologna during the 1150s, was normally added to medieval copies of the *Corpus iuris civilis*. It contained several provisions expressly approving some of the customary rights found in the Great Charter. "Judgment by peers," for example, was mentioned more than once in the *Libri* as a legitimate way of making decisions in feudal courts.⁴⁸ Almost identical usage of the phrase appeared in Magna

⁴⁶ The basic work on this chapter is Naomi Day Hurnard, *Magna Carta, Clause 34*, in R.W. Hunt, W.A. Pantin, and R.W. Southern, eds, *Studies in Medieval History presented to Frederick Maurice Powicke* 157 (Oxford 1948).

⁴⁷ The *locus classicus* in the Roman law was Cod. 8.52(53).2; in the canon law it was X 1.4.11. See also René Wehrlé, *De la coutume dans le droit canonique* (Recueil Sirey 1928); Burkhard Schmiedel, *Consuetudo im klassischen und nachklassischen römischen Recht* (Hermann Böhlau 1966).

⁴⁸ For example, Lib I, tit 18: "Si vero fuerit contentio inter minores valvasores et maiores de beneficio, in iudicio parium definiatur." See also Lib II, tit 21 § si vero; Lib II, tit 23. Here I have used the copy of the *Libri feudorum* that is included in the fifth volume of the edition of the *Corpus iuris civilis* printed in Venice in 1598. On the need to integrate this book with studies of medieval Roman and canon laws, see Stephan Kuttner, *The Revival of Jurisprudence*, in Robert L. Benson and Giles Constable, eds, *Renaissance and Renewal in the Twelfth Century* 299, 305-06 (Harvard 1982).

Carta (chs 39, 61). However, since we know so little about the arrival of the *Libri feudorum* in England,⁴⁹ and since so many of the ideas contained in it were widely known and accepted as a matter of course among the English baronage, as they were in other parts of Europe,⁵⁰ it would be incautious at best to count similarities of this kind as demonstrations of the existence of influence from outside on the Charter's provisions.

C. The Difficulties of Proving Influence

Underlying this inquiry is a methodological problem: the problem of proof. There is no *direct* evidence of the process by which the drafters arrived at the decisions they made. Every conclusion the historian draws must be based on reasonable inference from other kinds of evidence, not on strict proof. We do know that bishops and other clerics with a working knowledge of the learned laws played a role in formulating the Charter. The basic sources of the *ius commune*, the texts of the Roman and canon laws together with some early glosses, were at their disposal. We know also that some of the Charter's provisions were new in the sense that they were not to be found in the existing common law, and it will be shown in what follows that there were many similarities between these new provisions and the *ius commune*. What is harder to be sure about is whether the drafters were drawing upon the Roman and canon laws or were working from scratch. Conscious innovation is a possible source of law. Indeed its prevalence in 1215 has been the working assumption among modern commentators on the drafting of Magna Carta.

The Article returns to methodological problems after comparing the chapters of Magna Carta with the *ius commune*. I have postponed a fuller consideration, because any fair judgment about them must depend in part on a fuller examination of the evidence. At least as it seems to me, readers will be in a better position to make that judgment after having worked through the specific comparisons. In any event, making the comparisons without confronting the evidentiary problem at length is worth-

⁴⁹ See Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* 215-30, 387-88 (Oxford 1994). Walter Ullmann described the *Libri feudorum* as "easily available" to the framers of Magna Carta; unfortunately he cited no evidence to show that this was so. See Ullmann, *The Individual and Society* at 71 (cited in note 19).

⁵⁰ See Rafael Altamira, *Magna Carta and Spanish Mediaeval Jurisprudence*, in Malden, ed, *Magna Carta Commemoration Essays* 227 (cited in note 14) (comparing contemporary or earlier Spanish *fueros* to establish the priority, or at least the superiority, of the law of Spain). See also Edward Miller, *The Background of Magna Carta*, 23 *Past & Present* 72 (1962).

while for another reason. Even if readers are not convinced by the weight of the argument for causation, the specific comparisons are worth making, because at a minimum they show how many of the Charter's provisions cannot be described as "peculiarly English." There are many substantive parallels between Magna Carta and the European *ius commune* that deserve notice, even if readers come to reject the possibility that there was a causal connection between them.

II. COMPARISONS WITH THE *IUS COMMUNE*

More than isolated chapters raise the possibility that the *ius commune* played a role in the formulation of the Great Charter. In order to demonstrate the possibility, I have taken the provisions of Magna Carta in order. The texts of the principal chapters are given in extenso, and for the sake of brevity the additional chapters, which are similar to those printed, have been noted in parentheses. In every case, these secondary chapters enacted the same principle as did the principal text, but in a slightly different legal setting.

Chapters 1 (and 63)

In primis concessisse deo et hac presenti carta nostra confirmasse, pro nobis et heredibus nostris in perpetuum, quod Anglicana ecclesia libera sit, et habeat jura sua integra, et libertates suas illesas; et ita volumus observari; quod apparet ex eo quod libertatem electionum, que maxima et magis necessaria reputatur ecclesie Anglicane, mera et spontanea voluntate, ante discordiam inter nos et barones nostros motam, concessimus et carta nostra confirmavimus, et eam obtinuimus a domino papa Innocentio tertio confirmari quam et nos observabimus et ab heredibus nostris in perpetuum bona fide volumus observari. Concessimus etiam omnibus liberis hominibus regni nostri, pro nobis et heredibus nostris in perpetuum, omnes libertates subscriptas habendas et tenendas eis et heredibus suis, de nobis et heredibus nostris.

In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever, that the English church shall be free, and shall have its rights entire, and its liberties inviolate; and we

will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned to be of the greatest necessity and importance to the English church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from the lord Pope Innocent III, before the quarrel arose between us and our barons: and this we will observe, and our will is that it be observed in good faith by our heirs forever. We have also granted to all the free men of our realm, for us and our heirs for ever, all the liberties written below, to have and to hold to them and their heirs, of us and our heirs.

The ecclesiastical origins of the first and last of Magna Carta's chapters seem obvious and in fact have been widely recognized.⁵¹ Chapter 1 granted, and chapter 63 affirmed, that the English church should be free, enjoying its rights undiminished and its liberties unimpaired. Of these liberties, chapter 1 laid especial stress upon the freedom of elections as "of the greatest necessity and importance to the English church." The phrase in this chapter recognizing the existence of an "English church" in the context of a guarantee of rights, although not in frequent usage, was not unknown in the canon law. Similar phrasing appeared in documents that issued from the papal chancery itself;⁵² there was nothing uncanonical about its use.

This first chapter was also important beyond the immediate guarantee of substantive rights to the church. It took the form of a *concessio principis* used in the Roman law,⁵³ and it was granted in perpetuity to all free men of the realm. The sonorous phrase *in perpetuum* was a common feature of a papal diploma; here it was inserted to extend to the rights granted in subsequent chapters. The chapter's continuance "infected all the rest" of the Charter, as Professor Holt has put it.⁵⁴ All the Charter's liberties were to be held for the future, not restricted to John's lifetime, this being based upon the model of the church's continuing rights.

⁵¹ See Holt, *Magna Carta* at 285 (cited in note 5).

⁵² For example, C.R. Cheney and W.H. Semple, eds, *Selected Letters of Pope Innocent III concerning England (1198-1216)* 142, No 49 (1213) (Nelson 1953) (stating "si dictus rex violaverit pacem que inter ipsum et ecclesiam Anglicanam"). See also X 4.1.27, a decretal of Innocent III: "secundum consuetudinem ecclesiae Gallicanae" (original wording restored in Friedberg edition, Graz 1955). See generally Z.N. Brooke, *The English Church and the Papacy from the Conquest to the Reign of John* 1-21 (Cambridge 1931, repr 1968).

⁵³ See Wilks, *The Problem of Sovereignty* at 208 (cited in note 16).

⁵⁴ Holt, *Magna Carta* at 518 (cited in note 5).

Behind the first chapter stood a matter of the greatest moment to the clergy of the day, and also to the framers of the canon law. *Libertas ecclesiae* was the cardinal tenet of the movement of reform led by the papacy and embodied in the law of the church.⁵⁵ It was the clerical slogan of the day. The church's claim to "liberty" was of course not uniquely an English issue; nor was this the first time it had been raised in the context of episcopal elections in Angevin England.⁵⁶ A perceived necessity to establish the freedom of the clergy from control by the laity had been stressed by Pope Gregory VII (d. 1085),⁵⁷ reiterated by several of his twelfth century successors,⁵⁸ and embodied in canons of the Third (1179) and Fourth (1215) Lateran Councils.⁵⁹ Thomas Becket had declared that it was to preserve the liberty of the church that he struggled and died.⁶⁰ The principle, and the slogan that encapsulated it, entered the formal canon law at several points, as for example in declaring null and void any statute that contravened ecclesiastical liberty (X 5.39.49, 53).⁶¹

The Gregorian reformers regarded untrammelled freedom in the election of bishops as essential above all else to the fulfillment of the church's mission in the world (for example, Dist. 63 c. 34). It is no surprise to find it singled out both at the start, and at the end, of any document in which the clergy had real influence. By "liberty" the reformers meant entire freedom for the clergy to govern themselves, and in particular freedom to hold episcopal and monastic elections without any intervention or pressure from

⁵⁵ See generally Brigitte Szabó-Bechstein, *Libertas ecclesiae vom 12. bis zur Mitte des 13. Jahrhunderts. Verbreitung und Wandel des Begriffs seit seiner Prägung durch Gregor VII.*, in Johannes Fried, ed., *Die abendländische Freiheit vom 10. zum 14. Jahrhundert 147-75* (39 Konstanzer Arbeitskreis für mittelalterliche Geschichte 1991).

⁵⁶ It figured in Henry I's famous Coronation Charter, for example. See William Stubbs, *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First 116-17* (H.W.C. Davis, ed) (Oxford 9th ed 1913).

⁵⁷ For example, *Gregorii VII Registrum* IV, 3 (E. Caspar, ed) (1076), printed in *Monumenta Germaniae historica*, 2 *Epistolae selectae* (Weidmann 1955).

⁵⁸ For example, JL, No 11370 (1167). See Marcel Pacaut, *Alexandre III: Étude sur la conception du pouvoir pontifical dans sa pensée et dans son oeuvre* 130 (Librairie Philosophique J Vrin 1956) (noting the practical identity in Alexander III's mind between the material interests of the Church and the concept of ecclesiastical liberty).

⁵⁹ See Norman P. Tanner, ed, *Decrees of the Ecumenical Councils: Vol 1, Nicaea I to Lateran IV* ch 19 at 221; chs 42, 44 at 253-54 (Georgetown 1990).

⁶⁰ See James Craigie Robertson, ed, *Materials for the History of Thomas Becket, Archbishop of Canterbury* vol V, no 197; vol VI, no 397; vol VII, no 643 (67 Rolls Series 1875-85).

⁶¹ (= 5 Comp. 1.1.1; 5 Comp. 5.18.5); see, for example, *gl. ord.* ad X 5.39.49 s.v. *ecclesiae libertatem* ("[Q]ui enim contra ecclesiae libertatem venire nituntur, sunt ipso iure excommunicati."). See also Dist. 12 c. 12 (dealing with the unlawfulness of customs contrary to the freedom of the Christian religion); X 3.13.12 (declaring alienations of ecclesiastical goods by laymen invalid as contrary to "the immunity of ecclesiastical liberty").

lay rulers. The church had set its face against direct participation by any of the laity in these elections, but in 1215 the principal cause for concern was the king, whose role in choosing bishops had come to be supported by long tradition. Clear statement and constant vigilance were necessary because of the strength of that tradition, and texts of the canon law were marshaled to that end both in Gratian's *Decretum* (for example, Dist. 62 c. 2),⁶² and in the expanding decretal law (for example, X 1.6.14).⁶³ The goal of the canon law was to make the freedom of the clergy to elect their leaders a reality. In common with many European rulers, King John's actions had stood in the way of achieving that goal. Magna Carta's chapters 1 and 63 enacted this part of the canon law.

Chapters 7 and 8

Vidua post mortem mariti sui statim et sine difficultate habeat maritagium et hereditatem suam, nec aliquid det pro dote sua, vel pro maritagio suo, vel hereditate sua, quam hereditatem maritus suus et ipsa tenuerint die obitus ipsius mariti, et maneat in domo mariti sui per quadraginta dies post mortem ipsius, infra quos assignetur ei dos sua.

Nulla vidua distringatur ad se maritandum dum voluerit vivere sine marito; ita tamen quod securitatem faciat quod se non maritabit sine assensu nostro, si de nobis tenuerit, vel sine assensu domini sui de quo tenuerit, si de alio tenuerit.

A widow, after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the day of the death of that husband; and she may remain in the house of her husband for forty days after his death, within which time her dower shall be assigned to her.

⁶² The common clerical refrain was "Docendus est populus non sequendus," stated in this canon and many times elsewhere. For Gratian's conclusions about exclusion of the ruler from episcopal elections, see d.p. Dist. 63 c. 28.

⁶³ (= 2 Comp. 1.3.6). See also, for the canonists' attitude towards the people, *gl. ord.* ad X 1.6.2 s.v. *populi* ("Nota quod ad clamorem populi nullus est eligendus.").

No widow shall be compelled to marry, so long as she prefers to live without a husband; provided always that she gives security not to marry without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another.

In terms of the likelihood of influence, these two chapters stand at the opposite end of the spectrum from the two just discussed. Unlike chapter 1, the source of these two chapters can be traced to the canon law and the *ius commune* only in the sense of enacting policies that were found in, and important to, the contemporary canon law. The chapters did not track the exact language of either the canon or Roman law, as did chapters 1 and 63, and they implemented the underlying policies in ways that were designed to meet local conditions, not to fit categories taken over directly from the *ius commune*. Moreover, some of their contents had already been stated in Henry I's Coronation Charter.⁶⁴

Nonetheless, the coincidence between their substance and the *ius commune* is close enough, and the fit between them and the assumptions of most of the barons distant enough, to warrant consideration of the possibility of borrowing. Professor Michael Sheehan, for example, concluded that the Charter took a position about the rights of widows that was "remarkably close to that stated earlier in canon law."⁶⁵ This is undeniable as a statement of fact. Professor Janet Loengard has shown how awkwardly the new provisions fit with some existing English practices.⁶⁶ That too may suggest influence from without. In any event, there was clearly overlap in purpose. Chapter 7 provided inter alia that widows should enjoy their rights to dower, their marriage portion, and their inheritance without difficulty or special payment. Chapter 8 provided that widows should not be compelled to marry, but added that if they did wish to do so, they should be

⁶⁴ See Stubbs, *Select Charters* at 116-19 (cited in note 56).

⁶⁵ Michael M. Sheehan, *Canon Law and English Institutions: Some Notes on Current Research*, in Stephan Kuttner and J. Joseph Ryan, eds, *Proceedings of the Second International Congress of Medieval Canon Law* 391, 395 (S. Congregatio de Seminariis et Studiorum Universitatibus 1965). See also Javier Martínez-Torrón, *Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition* 101 (Duncker & Humblot 1998).

⁶⁶ Janet Senderowitz Loengard, *Rationabilis Dos: Magna Carta and the Widow's "Fair Share" in the Earlier Thirteenth Century*, in Sue Sheridan Walker, ed, *Wife and Widow in Medieval England* 59 (Michigan 1993) (showing inter alia the persistence of the practice of awarding dower only in lands the husband held on the day of the marriage). See also S.F.C. Milsom, *Inheritance by Women in the Twelfth and Early Thirteenth Centuries*, in Morris S. Arnold, et al, eds, *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne* 60, 63-64, 87 (North Carolina 1981).

obliged to give security not to marry without the assent of the lord of whom they held their land, including the king if they held of him in chief.

Both of these chapters promoted goals that were stated quite clearly in the *ius commune*. Widows were favorites of the canon law, and securing their legitimate rights upon the death of their spouses, the goal of Magna Carta's chapter 7, was also one of the avowed aims of the church's law. A canonical commonplace held that "the causes of widows and orphans are zealously to be pursued" (Dist. 87 c. 1).⁶⁷ A papal decretal of 1210 had only recently so stated (X 2.2.11).⁶⁸ Protection of a woman's matrimonial property was also a matter of the particular solicitude of the church, although no claim to direct ecclesiastical jurisdiction over the property involved was advanced in the canon law (X 4.20.6, 7).⁶⁹ In the first instance at least, it was enough for canonists that the substance of the right be made available in the secular courts. Similarly, the texts and gloss of the Roman law stated that securing the legitimate rights of widows to matrimonial property was a subject of the imperial law's special solicitude. The goal was said to be important to the public interest itself (Dig. 24.3.1).⁷⁰ It became possible for William Durantis, summing up the *ius commune* in the middle of the thirteenth century, to list twenty-four special privileges available to widows.⁷¹ The special protection for widows guaranteed by chapters 7 and 8 thus ran parallel to many provisions in their favor within the *ius commune*.

Freedom in marriage, the right secured to widows (at least in part) by the Charter's chapter 8, was also a fundamental tenet of the medieval canon law. "No one is to be compelled to marry another" (d. a. C. 31 q. 2 c. 1).⁷² "Marriages should be free" (X

⁶⁷ "[P]lus tamen viduarum et orphanorum causas et impensius ducimus exequendas, quas tueri a nobis." Also relevant were C. 11 q. 1 c. 34; C. 23 q. 5 c. 23; and C. 24 q. 3 c. 21. See also James A. Brundage, *Widows as Disadvantaged Persons in Medieval Canon Law*, in Louise Mirrer, ed., *Upon My Husband's Death: Widows in Literature and Histories of Medieval Europe* 193 (Michigan 1992).

⁶⁸ (= 3 Comp. 2.2.2). This became the *locus classicus* for discussion of the special rights of widows in the canon law. See also C. 30 q. 5 c. 6: "Nullum sine dote fiat coniugium."

⁶⁹ (= 3 Comp. 4.15.2, 3). The full *ius commune* on this subject turned out to be quite complex, and subject to other, countervailing forces. See Manlio Bellomo, *Ricerche sui rapporti patrimoniali tra coniugi: contributo alla storia della famiglia medievale* (Giuffrè 1961).

⁷⁰ "Dotis causa semper et ubique praecipua est. Nam et reipublicae interest dotes mulieribus conservari." See also Cod. 3.14.1, granting special privilege to widows and children *sui iuris*.

⁷¹ *Speculum iudiciale* Bk IV: 4, tit *de dote . . . restituenda*, no 30 (Basel 1574, repr 1975).

⁷² "Quod autem aliqua non sit cogenda nubere alicui." There was also some "overlap"

4.1.29).⁷³ Similar statements were frequent in several of the basic texts of the medieval canon law, and they were repeated tirelessly by all the commentators.⁷⁴ Freedom of entry into marriage was a value the church sought actively to implement in its own tribunals, and this freedom clearly encompassed a negative right, the freedom *not* to marry. This was not, of course, a freedom limited to widows. All persons, young or old, were to be free from coercion. It cannot be said, therefore, that Magna Carta stated the full canon law on this subject.

But the problem at hand in 1215 did not call for a full statement. The problem was that the king had taken to selling the hand of wealthy widows without their consent.⁷⁵ The drafters of Magna Carta invoked rules about freedom in marriage, widely recognized at the time, to deal with the specific problem before them. Even so, chapter 8 appears to have been something of a compromise.⁷⁶ The interests of the lords (and of the king) were respected up to a point. The widow's freedom in marrying, although protected, was not to be exercised to the lord's detriment; if it was, although the marriage itself would be valid, the security to be provided by widows might be forfeit to him.

Chapter 9

Nec nos nec ballivi nostri seisiemus terram aliquam nec redditum pro debito aliquo, quamdiu catalla debitoris sufficiunt ad debitum reddendum; nec plegii ipsius debitoris distringantur quamdiu ipse capitalis debitor sufficit ad solucionem debiti; et si capitalis debitor defecerit in solutione debiti, non habens unde solvat, plegii respondeant de debito; et si voluerint habeant terras et redditus debitoris, donec sit eis satisfactum de debito quod ante pro eo solverint, nisi capitalis debitor monstraverit se esse quietum inde versus eosdem plegios.

with the rules regulating marriage between Henry I's Coronation Charter and the canon law. See Stubbs, *Select Charters* at 118 (cited in note 56).

⁷³ "Cum itaque libera matrimonia esse debent . . ."

⁷⁴ For example, Rufinus of Bologna, *Summa decretorum* ad C. 31 q. 2, 473 (Paderborn 1902, repr Scientia Verlag 1963) (Heinrich Singer, ed) ("[U]bi est coactio, non est consensus, sine quo non potest incipere matrimonium.").

⁷⁵ See McKechnie, *Magna Carta* at 220 (cited in note 25); Janet Senderowitz Loengard, 'Of the Gift of her Husband': *English Dower and its Consequences in the year 1200*, in Julius Kirshner and Suzanne F. Wemple, eds, *Women of the Medieval World: Essays in Honor of John F. Mundy* 215, esp 234-40 (Basil Blackwell 1985).

⁷⁶ Perhaps with chapter 3 of Henry I's Coronation Charter; see Stubbs, *Select Charters* at 118 (cited in note 56).

Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties of the debtor be distained so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing with which to pay it, then the sureties shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show that he is discharged of it as against the said sureties.

Chapter 9 provided relief to those who had stood as sureties for the debts of others. It established that the personal assets of the principal debtor had to be exhausted before the creditor could have recourse against the sureties. In addition, it laid down the rule that if the sureties had been required to pay the debt, as could easily happen when the principal debtor held lands but insufficient chattels, the sureties would be put into possession of the principal debtor's lands and would enjoy the revenue issuing from those lands until they had been indemnified for their earlier payment.

The need for such a measure must have been recognized at least among those affected. During this early period in the history of English law, oral suretyship agreements were common and enforceable. Before the rise of the requirement that an action of covenant could be brought only if the claimant had a sealed instrument, a development of the late thirteenth and early fourteenth century, a surety bound himself *in solidum* with the principal debtor without any formality at all.⁷⁷ The creditor could then choose among the sureties, even without suing the principal debtor first.

The evident need for reform of this area of the law was answered in chapter 9 by adopting an English equivalent of the civil law's *beneficium excussionis*. It was also known of as the *beneficium concussionis* or sometimes the *beneficium ordinis*. A similar development had occurred in the Roman law. The classical law had permitted creditors to have recourse against sureties before resorting to the original debtor (Cod. 8.41.5; Dig. 46.1.51.3). The Emperor Justinian, claiming that the ancient law had been to the

⁷⁷ Albert Kiralfy, *History of the law of personal guarantee (suretyship) in England since 1500*, in *Les sûretés personnelles* 399, 406 (29:2 Recueils de la Société Jean Bodin 1971). An action for debt against the surety did not lie, because no *quid pro quo* would have been given by the creditor to the surety.

contrary, granted this privilege to sureties.⁷⁸ One of his laws enacted that they could be sued only after the principal debtor's assets had been exhausted (Nov. 4.3.1). The choice was thus taken away from the creditor. Although the Charter did not use the language drawn from Justinian's novel, the effect of this chapter was to adopt exactly the rule it contained.⁷⁹ In discussing chapter 9, McKechnie noted that, although there seems to have been no precedent for it in the existing common law, this rule is one that "has found favour in most systems of jurisprudence."⁸⁰ That may well be an interesting clue to its origins.

It is worthy of note that chapter 9 did not become the law of England, at least for a very long time. It was not included in the reissue of 1225, and it failed to take hold in practice. The *beneficium excussionis* was taken into the law of medieval Scotland, but its adoption in England had to await modern times. A second negative point is also worth noting. The original Magna Carta did not adopt the civilian *beneficium divisionis* (Cod. 4.18.3), under which all sureties were guaranteed equal treatment in meeting the debtor's obligation, although the Roman law rule was applied to the liability of executors in the probate system administered by the English church. Today it appears that this would have been an equally happy choice to have been made in 1215. But it was rejected by the drafters in 1215. As happened in several of Magna Carta's other provisions, the drafters picked from among the rules of the *ius commune*. They did not take them all, and not even all of those they did pick outlasted the events of 1215.

Chapters 10 (and 11)

Si quis mutuo ceperit aliquid a Judeis, plus vel minus, et moriatur antequam illud solatur, debitum non usuret quamdiu heres fuerit infra etatem, de quocumque teneat; et si debitum illud inciderit in manus nostras, nos non capiemus nisi catallum contentum in carta.

If one who has borrowed any sum, great or small, from the Jews shall die before the loan be repaid, the debt shall not bear interest as long as the heir is under age,

⁷⁸ William Burge, *Commentaries on the Law of Suretyship* 329-42 (Charles C. Little & James Brown, 1st Amer ed 1847). See generally Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* 129-31 (Juta 1990).

⁷⁹ The point is made and discussed by van Caenegem, *An Historical Introduction to Private Law* at 180-81 (cited in note 26).

⁸⁰ McKechnie, *Magna Carta* at 222 (cited in note 25).

of whomsoever he may hold; and if the debt fall into our hands, we shall not take anything except the principal sum contained in the charter.

The restrictions in chapters 10 and 11 on the payment and collection of usury arising out of debts owed to Jews present a perplexing problem, and the narrow range of remedies the Charter offered to creditors make them an obvious candidate for criticism as superficial.⁸¹ The chapters were deleted in the reissues. The first provided that heirs of persons who died still in debt to a Jew were not to be required to pay any interest on the debt during their minority and enacted that the king himself would not collect anything but the principal sum if a debt owed to a Jew fell into his hands. The second added that widows should receive their dower rights unencumbered by the debt to the Jews. These provisions are normally treated by historians simply as one more incident in the sad story of the deteriorating treatment of the Jews in England and as a way of preventing King John from taking unfair advantage of his position as protector of the Jews by himself collecting money owed to them.⁸² When one takes this approach, little attention need be paid to the details contained in the chapters.

Examination of the canon law on the subject opens up a more sophisticated, although speculative, reading.⁸³ In substance, chapter 11 simply protected the rights of widows and was of a piece with chapters 7 and 8, which have just been examined. The same connection with the goals of the canon law can be made for it. Chapter 10 is harder to understand, but again analysis of the Roman and canon laws opens up a clearer window of sight on its meaning. As censorious as it was about usury and as mandatory as some of its prohibitions against usury seemed, an argument could be made in the law of the medieval church that the taking of "moderate usury" by Jews was permissible (X 5.19.18).⁸⁴ They stood outside the Christian dispensation and were not necessarily bound by its law. However, the *ius commune* also contained restrictions to any such concession that some interest might law-

⁸¹ See Holt, *Magna Carta* at 335-36 (cited in note 5). The fullest attempt to put these chapters into their historical context is R. Malcolm Hogg, *Jews, Guardians, and Magna Carta, Clause 11*, 4 L & Hist Rev 367 (1986); it contains many valuable insights.

⁸² See McKechnie, *Magna Carta* at 223-30 (cited in note 25).

⁸³ It has the added advantage of rendering some of the detail—use of the civilian term *mutuum* in chapter 10 for instance—more readily comprehensible.

⁸⁴ (= 4 Comp. 5.7.3, from Lateran IV, c. 67); it forbade the taking by Jews of "graves et immoderatas usuras" from Christians, and could be read *a contrario sensu* as permitting "moderate" interest. See *gl. ord.* ad X 5.19.18 s.v. *immoderatasve*. The subject was contested however. See *gl. ord.* ad C. 14 q. 4 c. 12 and X 5.19.12.

fully be paid, and one of these was for minors who owed debts. According to a text in the Digest, interest need not be paid by minors, precisely because full administration of their property was not yet in their hands (Dig. 22.1.17.4).⁸⁵ The canonists endorsed the rule.⁸⁶ Minors could not be compelled to pay more than the principal sum by being required to pay interest to cover the time during which they were not *sui iuris*. This rule amounted to a kind of moratorium on the payment of interest during minority, a moratorium that the church in turn was then seeking to extend to crusaders.⁸⁷ That advantage was in essence exactly what Magna Carta's chapter 10 provided them.

The second half of chapter 10 dealt with the receipt of usury by the king. It implemented the principle of the Roman and canon law of agency: *Qui facit per alium . . . facit per se* (Dig. 50.17.80, Sext 5.12.72). Whereas it might be lawful for a Jew to receive moderate interest on a loan, it was clearly not lawful for a Christian to do so (C. 14 q. 4 c. 7), and both "direct" and "indirect" usury were prohibited. Canons of English synods condemned both in explicit terms.⁸⁸ The law's effort was thus to "look through" the nominee to the principal. For King John to have enforced the right to interest for which the Jews had contracted when their rights had subsequently fallen into his hands would thus have put him in an unlawful position under the canon law. It would have made him an indirect usurer. One of the reasons, for example, that Jews were required to pay tithes on lands they occupied (X 3.30.6) was precisely to prevent the evasion of the obligation imposed on all Christians. The canon law therefore provided that a legal duty could not be evaded by putting property into the hands of a nominee.

Personal animus against John may have lain behind this provision; the king was undeniably singled out. However, the realities of the day meant that he would have been the only person in a position to evade the rule against taking usury in this way, since the king alone held assets and claims that had belonged to the Jews. Singling him out made sense under the circumstances.

⁸⁵ See also Cod. 5.56.3.

⁸⁶ For a succinct medieval explanation by a canonist, see Hostiensis, *Summa aurea* Bk V, tit *De usuris*, no 2.

⁸⁷ See Solomon Grayzel, *The Church and the Jews in the XIIIth Century: Vol 2, 1254-1314* 220-21 (Jewish Theological Seminary 1989) (Kenneth R. Stow, ed).

⁸⁸ For example, *Statutes of Worcester I (1219)* ch 6, in F.M. Powicke and C.R. Cheney, eds, *2 Councils & Synods with other Documents relating to the English Church, A.D. 1205-1313* part 1 at 55 (Oxford 1964).

Chapter 12

Nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum et primogenitum filium nostrum militem faciendum, et ad filiam nostram primogenitam semel maritandam, et ad hec non fiat nisi rationabile auxilium; simili modo fiat de auxiliis de civitate Londonie.

No scutage nor aid shall be imposed on our kingdom, except by common counsel of our kingdom, unless it be for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.

This chapter promised that the king would levy no aid or scutage without the "common counsel of the realm." The chapter's obvious aim was to prevent arbitrary taxation by the king. This concession was later read anachronistically to require Parliamentary assent to the levying of any tax, but in 1215 it referred to a process rather than to an institution.⁸⁹ The king was to take counsel with the "archbishops, bishops, abbots, earls and the greater barons,"⁹⁰ as well as the other tenants in chief, before imposing any but the three customary aids mentioned in the chapter. The Fourth Lateran Council acted to forbid subjecting the church and the clergy to "tallages, taxes, and other exactions" in the same year the Charter was issued.⁹¹ It has been justly said that, on this particular point, "Magna Carta and the Lateran Council joined hands."⁹²

The notion that a leader should take counsel with others before acting was an established usage that would have been widely known in 1215.⁹³ Perhaps it should be excluded from the chapters

⁸⁹ Albert White, *Was there a "Common Council" before Parliament?*, 25 *Am Hist Rev* 4 (1919-20); Gavin I. Langmuir, *Per Commune Consilium Regni in Magna Carta*, 15 *Studia Gratiana* 467 (1972).

⁹⁰ Taken from chapter 14 of the Magna Carta.

⁹¹ Chapter 46 in Tanner, ed, 1 *Decrees of the Ecumenical Councils* at 255 (cited in note 59).

⁹² Marion Gibbs and Jane Lang, *Bishops and Reform 1215-1272: With Special Reference to the Lateran Council of 1215* 134 (Oxford 1934). To the same effect is J. Gilchrist, *The Church and Economic Activity in the Middle Ages* 18 (Macmillan 1969).

⁹³ See Adams, *Origin* at 221 (cited in note 14) (stating the notion was "already the universal law of the feudal world"). See also Sidney Painter, *Magna Carta*, in Fred A. Cazell,

being considered on this account. However, the underlying principle, that the king's power was not absolute and that he should take action only with the consent of those he governed, was such a pervasive part of contemporary canon law, and was so apt to strike a responsive chord with any clerical draftsman, that the possibility of a connection is worth taking seriously.⁹⁴ A jurist trained in the *ius commune* would not, in any event, have recognized a sharp distinction between the desirability of the concept's being applied in an ecclesiastical as opposed to a temporal context.⁹⁵ The underlying rule, one not limited to any one legal system, of reaching the right decision through taking counsel was what would have mattered.

This same principle was stated and applied at many places in the canon law. It ran like a leitmotif through the canonical texts and glosses. Churches were to be governed "by the common counsel of the priesthood" (Dist. 95 c. 5).⁹⁶ Popes themselves rightly took action "by the counsel of their brethren" (C. 16 q. 2 c. 1).⁹⁷ Episcopal elections were to be conducted "by the counsel of religious men" (Dist. 63 c. 35).⁹⁸ Bishops might act to alienate surplus property of their sees only "by the counsel and assent of their brethren" (X 3.13.8).⁹⁹ The patriarch of Jerusalem, though *caput* of his church, must not take action in regulating its affairs "without counsel" (X 3.10.4).¹⁰⁰ Magna Carta's chapters 12 and 14 thus used language of a kind that would have been "familiar to any monk or canon."¹⁰¹

The utility of considering the canon law to help understand these two chapters actually extends a little further. The translation of the word *consilium* in chapter 12 has long presented difficulty.¹⁰² Did the word mean "consent" or only "counsel"? That is, once taken, must the counsel be followed? The Charter did not

Jr., ed, *Feudalism and Liberty: Articles and Addresses of Sidney Painter* 244, 248-50 (Johns Hopkins 1961).

⁹⁴ See R.W. Carlyle and A.J. Carlyle, *The Political Theory of the Thirteenth Century*, 5 *History of Mediaeval Political Theory in the West* 97-106 (William Blackwood & Sons 1962) (containing references to many jurists).

⁹⁵ See, for example, C. 23 q. 1 c. 4, applying the principle to wars; see esp *gl. ord.* ad id s.v. *principes*.

⁹⁶ "... communi presbyterorum consilio ecclesiae gubernabantur."

⁹⁷ "Consilio itaque multorum fratrum diligenter exquisito decernimus."

⁹⁸ "... ne ... excludant religiosos viros, sed eorum consilio honestam et idoneam personam in episcopum eligant."

⁹⁹ (= 2 Comp. 3.10.1): "de fratrur tuorum et sanioris partis concilio et assensu."

¹⁰⁰ (= 2 Comp. 3.10.1). See esp *gl. ord.* ad id, "Item prelatu negotio ecclesiae suae de consilio fratrum suorum facere debet."

¹⁰¹ The phrase is Gavin Langmuir's; see Langmuir, 15 *Studia Gratiana* at 484 (cited in note 89). See also Post, *Studies in Medieval Legal Thought* at 231-34 (cited in note 32).

¹⁰² See, for example, Holt, *Magna Carta* at 317 n 103 (cited in note 5).

say. The efforts of the drafters here seem (to us) maddeningly imprecise. In fact, however, something like the same ambiguity existed in the contemporary *ius commune*. The distinction between taking counsel and securing consent was not so clear in 1215 as it is to us today. The canonists were of course quite capable of seeing the difference between the two when there was an absolute necessity for doing so. They wrestled with, but did not resolve, the problem in the context of episcopal elections.¹⁰³ One reason it presented such a difficult problem for them was that the canons themselves sometimes used both terms in the disjunctive (C. 16 q. 7 c. 36).¹⁰⁴ The two were used apparently interchangeably in similar circumstances, and no obvious distinction was drawn between the meaning ascribed to the one or to the other.¹⁰⁵ In 1215 it would have been doubly difficult to draw a rigid line between them, because the classical canon law rarely admitted that decisions should be made simply by holding an election in which the majority vote would prevail.¹⁰⁶ The canonists assumed that the right decision would emerge from proper *consilium*. The desire for a precise legal distinction between counsel and consent is a modern one.

Chapter 14

Et ad habendum commune consilium regni de auxilio assidendo aliter quam in tribus casibus predictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per litteras nostras; et preterea faciemus summoneri in generali, per vicecomites et ballivos nostros, omnes illos qui de nobis tenent in capite; ad certum diem, scilicet ad terminum quadraginta dierum ad minus, et ad certum locum; et in omnibus litteris illius summonicionis causam summonicionis exprimemus; et sic facta summonicione negocium ad diem assignatum procedat secundum consilium illorum qui presentes fuerint, quamvis non omnes summoniti venerint.

¹⁰³ Evidence on this point is collected in R.H. Helmholz, *The Spirit of Classical Canon Law* 52-55 (Georgia 1996).

¹⁰⁴ " . . . communi consensu et consilio." See also Dist. 63 c. 33: "aut meo consilio, aut meo consensu"; C. 11 q. 3 c. 105: "in eorum consilio et communionis consensu."

¹⁰⁵ X 3.10.2 ("assensu"); X 3.10.4 ("consilio"); X 3.10.1 ("collaudatione et subscriptione").

¹⁰⁶ The authorities are collected and discussed in A. Esmein, *L'unanimité et la majorité dans les élections canoniques*, in 1 *Mélanges Fitting* 355, 374-75 (Scientia Verlag Aalen 1907, repr 1969) ("la haine de la pure loi du nombre").

And for obtaining the common counsel of the kingdom concerning the assessment of an aid, except in the three cases aforesaid, or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons severally by our letters; and will also cause to be summoned generally through our sheriffs and bailiffs all others who hold of us in chief, for a certain day, namely after a term of forty days at the least, and at a certain place; and in all letters of such summons we will express the cause for the summons. And when the summons has thus been made, the business shall proceed on the day appointed according to the counsel of those who are present, even though not all those summoned have come.

This chapter, effectively a companion to chapter 12, provided a guarantee that those whose interests would be affected by taxation would be duly summoned to give their counsel. They were entitled to receive an appropriate form of summons, to know the cause for which they were being summoned, and to have at least forty days warning in advance. The chapter further enacted that those who had been summoned but did not appear would be bound by the action taken in consequence of the summons.

Walter Ullmann once pointed out that the procedure envisioned in chapter 14 for binding the absent was "alien to feudal law and feudal conceptions." He added, however, that the procedure was "a familiar one in the current canon law."¹⁰⁷ Professor Ullmann was making this observation to explain why the chapter was excluded from subsequent reissues of the Charter. It was omitted, he wrote, because it "contained a principle that could not be squared to fundamental feudal ideas."¹⁰⁸ Surely, however, the initial presence of the canonical principle in the chapter must be as noteworthy as its omission from the reissues.

The binding character of a decision arrived at by a deliberative body was a rule first fully worked out in the context of the canonical law of elections, though it was in due course expanded to govern many kinds of decisionmaking by ecclesiastical corporations. Bishops were chosen by election under the classical canon law—normally by the chapter of the cathedral of their diocese (Dist. 63 c. 35). Under normal procedure, each member of the cathedral chapter was entitled to be summoned personally to take

¹⁰⁷ Ullmann, *The Individual and Society* at 78 (cited in note 19).

¹⁰⁸ Id. See also McKechnie, *Magna Carta* at 254 (cited in note 25).

part in the election (X 1.6.35).¹⁰⁹ It was accepted that some of those who were summoned might not attend in response (X 1.6.19),¹¹⁰ but the canon law held that the absent were nevertheless bound by a legitimate decision made by the *maior et sanior pars* of those who had been present in person to take part in the election (X 1.6.28).¹¹¹ It is the same rule enacted by chapter 14. The importance of Romano-canonical procedure in shaping the evolution of representative assemblies has been widely recognized by modern historians. Concepts were taken over from the *ius commune* to fix rules for the assemblies.¹¹² This seems to be another example.

The requirements in chapter 14 governing the form of the summons also tracked evolving rules within the *ius commune*. Parties to court actions, indeed to all official actions that could affect their interests adversely, were entitled to be cited and heard (d. p. C. 5 q. 2 c. 4). The document citing them was to name a certain day and place for them to appear (X 1.3.25).¹¹³ The citation had also to contain an appropriate *terminus*, a fair interval between the summons and the event (C. 5 q. 2 c. 1), and it was required that the summons state the *causa* for which the recipient was being cited (X 2.8.2).¹¹⁴ The requirements, as a later civilian put it, were designed so that the recipient would have "full and particular knowledge of the action to be taken."¹¹⁵ Chapter 14's requirements on this score might almost have been taken from a summary of a contemporary *ordo iudiciarius*.

Chapters 20 (and 21)

Liber homo non amercietur pro parvo delicto, nisi secundum modum delicti; et pro magno delicto amercietur secundum magnitudinem delicti, salvo contenemento suo; et mercator eodem modo, salva mercandisa sua; et

¹⁰⁹ (= 4 Comp. 1.3.1).

¹¹⁰ (= 3 Comp. 1.6.4).

¹¹¹ (= 3 Comp. 1.6.12). See also Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 BC L Rev 37, 67-70 (1991).

¹¹² For example, Post, *Studies in Medieval Legal Thought* at 91-162 (cited in note 32).

¹¹³ For an example, see Aegidius de Fuscarariis, *Ordo Iudiciarius* ch 3, in Ludwig Wahrmund, ed, 3:1 *Quellen zur Geschichte des Römisch-kanonischen Prozesses im Mittelalter* 6 (Scientia Verlag Aalen 1916, repr 1962).

¹¹⁴ (= 2 Comp. 2.4.1). It was necessary to read this decretal *a contrario sensu* to reach the conclusions the canonists drew from it. In time, the question became a subject of dispute, but the safer procedure remained to state the *causa* in the citation.

¹¹⁵ Sebastianus Vantius, *Tractatus de nullitatibus processuum ac sententiarum*, tit de nullitate ex defectu citationis, no 30 (Venice 1567) f. 189v.

villanus eodem modo amercietur salvo waynagio suo; si inciderint in misericordiam nostram; et nulla predictarum misericordiarum ponatur, nisi per sacramentum proborum hominum de visneto.

A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his livelihood, and a merchant in the same way, saving his merchandise, and a villein shall be amerced in the same way, saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.

These chapters state an attractive, even seductive, rule that was to enjoy an uneven reception in the later development of the common law: that amercements of both free men and villeins by the king should be made only *secundum modum delicti* and should always be moderate enough to preserve the means of livelihood to the person being amerced. Chapter 21 invoked the same rule for earls and barons *mutatis mutandis*, adding that their amercements should be decided by a judgment of their peers. The broader principle in both chapters was that of proportionality in punishment. So far as is discernible from the public record, this marked its first appearance in the English common law.¹¹⁶ In time it was to give rise to the writ *de moderata misericordia*,¹¹⁷ but in 1215 the principle was being invoked by the English barons in the general circumstance of amercements levied by the king and his officers for violations of the law. At that time, amercements—roughly speaking what today are called fines—were the way in which the king's courts dealt with all but the most serious criminal offenses.¹¹⁸ For that reason, it was only natural that the principle of proportionality should have been linked specifically to them.

In its outlines, the *ius commune* on this subject was identical to these chapters of Magna Carta. Gratian's *Decretum* and its accompanying *glossa ordinaria* stated the same rule at several

¹¹⁶ J.H. Baker, *An Introduction to English Legal History* 584 n 57 (Butterworths 3d ed 1990).

¹¹⁷ See Anthony Fitzherbert, *The New Natura Brevium* 167-71 (London 1704).

¹¹⁸ For this reason, there are evident objections to the historical treatment of the Charter found in Justice Blackmun's opinion in *Browning-Ferris Industries of Vermont, Inc v Kelco Disposal, Inc*, 492 US 257, 268-73 (1988).

points. When the delicts were equal so should the penalties be equal (C. 15 q. 3 c. 4).¹¹⁹ Greater delicts were to be subject to greater penalties, and lesser delicts to lesser penalties (C. 24 q. 1 c. 21).¹²⁰ Punishments were to be determined in part by the status of the person being punished (C. 14 q. 6 c. 1).¹²¹ Texts from Roman law were also cited by commentators to buttress these rules of proportionality and good sense (Nov. 127.4).¹²² Moreover, the seed, animals, and tillage necessary for the livelihood of *rustici* were given special protection against incursion under the *ius commune* (Cod. 8.16(17).8; X 1.34.2), just as they were in chapter 20.¹²³ It was part of the civil law's attempt to protect those who were otherwise rightless (Dig. 1.6.1.2; Cod. 9.14.1).¹²⁴ The assumption of the contemporary *ius commune* was thus that punishments should be fixed in accordance with the nature of the crime and the status of the offender. This goal was balanced, and to some extent undercut, by that competing (and increasingly strong) rule that the discretion of the judge was to be given a wide scope in determining the scope of punishment.¹²⁵ However, judicial discretion never entirely eclipsed the principle of proportionality, and in 1215 the lengths to which judicial power would eventually be extended were not yet manifest.

That the emphasis on proportionality was the same rule being adopted within a more limited setting by Magna Carta's chapters 20 and 21 seems evident. That a parallel concern for preservation of the livelihood of those subject to amercement existed seems equally clear. In fact, Sir Edward Coke himself noticed the connection between the civil law and this protection being afforded to villeins of a right to the means of subsistence.¹²⁶

¹¹⁹ See also *gl. ord.* ad C. 36 q. 2 c. 4 s.v. *nullus*: "Unde arg[umentum] quod ista delicta paria sunt; ergo pari poena sunt punienda."

¹²⁰ See also *gl. ord.* ad id s.v. *scelaratius*: "Nam dicitur lex quod maiora delicta maioribus poenis, minore minoribus sunt punienda; et in delicto aequali propinquas esse poenas."

¹²¹ See also *gl. ord.* ad id s.v. *diversitas*: "[S]ecundum diversitatem personarum diversae poenae statuuntur." For confirmation from the civil law, see *gl. ord.* ad Cod. 9.30.1 s.v. *gravissimam*: "Vel dic pro qualitate personae et dignitatibus."

¹²² "In delicto enim aequali proximas eis imminere poenas iustum putavimus esse," cited in *gl. ord.* ad C. 24 q. 1 c. 21, s.v. *sceleratius*. On Roman law, see also *gl. ord.* ad Cod. 9.12(13).9 s.v. *crimen*: "Quia ergo est aequale crimen, videtur aequalis poena."

¹²³ (= 1 Comp. 1.24.2), taken from Lateran III, ch 22.

¹²⁴ The parallel is noted in *Select Passages from the Works of Bracton and Azo* 67, 71 (8 Selden Society 1894) (Frederic William Maitland, ed.).

¹²⁵ See Laurent Mayali, *The Concept of Discretionary Punishment in Medieval Jurisprudence*, in Rosalio Iosepho Card. Castillo Lara, ed, *Studia in honorem eminentissimi Cardinalis Alphonsi M. Stickler* 299 (7 *Studia et Textus historiae iuris canonici* 1992).

¹²⁶ Coke, 1 *Second Institute* at 132 (cited in note 12). On the law of wainage, see Paul R. Hyams, *Kings, Lords and Peasants in Medieval England: The Common Law of Villeinage*

It also seems worthy of note that these chapters used the civilian's word "delict" alongside with the more typically English term of "amercement" in stating the rule. It looks very much as though the drafters of the Charter, seeking to put a stop to what they regarded as King John's high-handed use of legal institutions to enrich himself, found in contemporary canon and Roman laws the principle, and even some of the words, they hoped would curb his actions.

Chapter 22

Nullus clericus amercietur de laico tenemento suo, nisi secundum modum aliorum predictorum, et non secundum quantitatem beneficii sui ecclesiastici.

A clerk shall not be amerced in respect of his lay tenement except after the manner of the others aforesaid; further, he shall not be amerced in accordance with the extent of his ecclesiastical benefice.

This chapter guaranteed the same right of proportionate amercement to the clergy that had been guaranteed to all free men and even unfree men in the prior two chapters. It also added a second significant limitation appropriate for the clergy: no cleric should be amerced "in accordance with the extent of his ecclesiastical benefice." Amercements were thus to be limited to a cleric's own lay tenements, if he possessed any. The principle behind this limitation, well stated by McKechnie (though without finding a link to the canon law), was that "no account was to be taken of possessions of which he [the cleric] was not really owner."¹²⁷

This chapter essentially stated the canon law current at the time. Clerics were not to hold their benefices as personal possessions over which they had free disposition. Although the rule was not always respected in daily life, in law they had no right to alienate the property belonging to the benefice; they merely enjoyed its fruits while they held it. Their benefices were offices, not personal possessions.¹²⁸ Hence it followed logically that any property belonging to their benefices should not be subject to diminution through their fault. The possibility of canonical influence

in *the Twelfth and Thirteenth Centuries* 143-45 (Oxford 1980).

¹²⁷ McKechnie, *Magna Carta* at 299 (cited in note 25).

¹²⁸ See Udo Wolter, *The officium in Medieval Ecclesiastical Law as a Prototype of Modern Administration*, in Antonio Padoa-Schioppa, ed, *Legislation and Justice* 17 (Oxford 1997).

here therefore does not seem open to doubt. Chapter 22 is one of the provisions where the self-interest of the clergy was directly involved, and it is as natural to suppose that there was canonical influence in its drafting as it is to assume that baronial influence stood behind chapter 34, which protected the courts of lords against encroachment by the king.

Working through the canonical development on this subject confirms the possibility. It shows that contemporary canonists regarded the principle embodied in chapter 22 as fundamental. What belonged to God should not be turned to temporal uses (C. 23 q. 8 c. 21). The principle had important consequences, although the exact reach of some of them remained open to debate. Enthusiasts about the church's past and dreamers about its future supposed that the clergy should possess nothing of their own, rather holding all things in common and remaining unconstrained by secular ties (C. 12 q. 1 c. 2). This was not the law, however. In 1215 it was clear beyond doubt that this ideal situation would not soon be realized. Under existing law, individual clerics could lawfully hold property on their own behalf (d. p. C. 12 q. 1 c. 24). Both they and their churches might also be under monetary obligations to temporal lords because of these lay possessions.¹²⁹ This was the reality. It could not be wished away. The effort of the canon law in consequence was to minimize the effects and to draw as firm and satisfactory a line between the spiritual side of things and the secular sphere as was feasible.¹³⁰

From this effort issued two legal rules. The first was the jurisdictional rule that only in matters pertaining to fiefs could a cleric be sued in a temporal court; in other matters he enjoyed the exemption known as the *privilegium fori* (X 2.2.7).¹³¹ The second was that when the cleric did legitimately come before a lay judge, the ecclesiastical property he administered enjoyed an immunity from his temporal obligations. The latter meant that "the delicts of the parson [the cleric] cannot be converted into an injury to the church" (d. p. C. 16 q. 6 c. 3). Thus, where a secular court required a cleric to pay the expenses of litigation, as it had every right to do under canonical principles, the payment could not be

¹²⁹ See Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian's Decretum* 218-19 (California 1972).

¹³⁰ For example, the law worked out some of the details in X 3.25.1, dealing with the so-called "peculium clericorum" and property acquired after the cleric had entered into a benefice. The canon law created the presumption that whatever had come into his hands in these circumstances belonged to the church, but allowed the presumption to be rebutted by sufficient evidence to the contrary.

¹³¹ (= 2 Comp. 2.2.3).

levied out of revenues accruing from the cleric's benefice (X 2.28.26).¹³² It had to come from the cleric's individual property instead.

The underlying legal principle was most often stated by the rule that "the cleric does not make the fruits of a benefice his own" by taking possession of the benefice (C. 12 q. 5 c. 4). Goods acquired by clerics during their incumbency were presumed to belong to the benefice, not to the incumbent as an individual. For this reason those goods were also beyond the reach of creditors. In time, this canonical rule's capacity for manifest injustice to creditors led to disagreement and sophisticated distinctions among the canonists,¹³³ and also to its widespread disregard by the secular courts.¹³⁴ But in 1215, the division and its consequences stood as established parts of the *ius commune*, and in substance both were enacted in chapter 22.

Chapters 26 (and 27)

Si aliquis tenens de nobis laicum feodum moriatur, et vicecomes vel ballivus noster ostendat litteras nostras patentes de summonicione nostra de debito quod defunctus nobis debuit, liceat vicecomiti vel ballivo nostro attachiare, et inbreviare catalla defuncti inventa in laico feodo, ad valenciam illius debiti, per visum legalium hominum, ita tamen quod nichil inde amoveatur, donec persolvatur nobis debitum quod clarum fuerit; et residuum relinquatur executoribus ad faciendum testamentum defuncti; et, si nichil nobis debeatur ab ipso, omnia catalla cedant defuncto, salvis uxori ipsius et pueris rationabilibus partibus suis.

If anyone holding a lay fief of us shall die, and our sheriff or bailiff shall exhibit our letters patent of summons for a debt which the deceased owed to us, it shall be lawful for our sheriff or bailiff to attach and catalogue chattels of the deceased, found upon the lay fief, to the value

¹³² (= 1 Comp. 2.20.42), from Lateran III, ch 6. See also X 2.25.6, and esp *gl. ord.* ad id s.v. *licet autem*.

¹³³ These are reflected and would be discussed at length, for example, in Panormitanus, *Commentaria* ad X 2.28.26, no 20 and ad X 3.5.28, no 17.

¹³⁴ In England, the royal courts were accustomed to requiring bishops to levy on the benefices of clerics without lay fees in order to pay debts or damages incurred in litigation. It was a disputed question among the canonists whether this was a permissible custom. See Joannes Andreae, *Lectura* ad Sext 5.12.79, in *In Sextum Decretalium librum Novella Commentaria* 46A (Venice 1581).

of that debt, at the sight of law-worthy men, provided always that nothing whatever be thence removed until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfill the will of the deceased; and if there be nothing due from him to us, all the chattels shall go to the deceased, saving to his wife and children their reasonable parts.

These two chapters state that when a man died leaving a last will and testament, his last wishes should be carried out according to the will's directions, saving to his wife and children their "reasonable parts" of his goods. When a free man died intestate, his goods should be distributed by his relatives under the supervision of the church.¹³⁵ To anyone familiar with the subsequent history of probate jurisdiction in England, these principles seem reasonable, even inevitable. Nevertheless, they would have been quite debatable at the time. Testamentary freedom was not a given. With real property, testamentary freedom was in fact contrary to the basic rules of the common law. It was not embraced by the common law until more than 300 years later, and even then not fully.¹³⁶ As for chattels, in 1215 the claims of a vassal's lord were as strong as those of the next of kin.¹³⁷ The heir at law might also have made a plausible claim to the chattels. The Assize of Northampton (1176) had in fact allotted the chattels to the heir, subject to making a division of the dead man's part.¹³⁸ Magna Carta's provisions on the subject represented a choice among competing rules of law.

If one looks for contemporary statements of the choice that was in fact made in these two chapters, the *ius commune* appears to be the most likely candidate. Papal letters, some of which were directed to English bishops, stressed the principle of testamentary freedom.¹³⁹ They encumbered that freedom only with the identical concession of the share for a man's wife and children

¹³⁵ See Stubbs, *Select Charters* at ch 27, 296 (cited in note 56) ("per visum ecclesiae").

¹³⁶ Statute of Wills, 32 Hen VIII, ch 1 (1540), in 3 *The Statutes of the Realm* 744-45 (1817). See generally J.M.W. Bean, *The Decline of English Feudalism 1215-1540* 40-103 (Manchester 1968).

¹³⁷ See G.D.G. Hall, ed and trans, *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur* 89 (Oxford 1993). See also McKechnie, *Magna Carta* at 326-29 (cited in note 25); Daniel Williman, *The Right of Spoil of the Popes of Avignon 1316-1415* (78:6 Transactions of the American Philosophical Society 1988).

¹³⁸ Stubbs, *Select Charters* at 179 (cited in note 56).

¹³⁹ See, for example, Letter from Pope Alexander III to the Bishop of Ely (1178 x 1181), in 2 Comp. 3.14.1. See also Hyams, *Kings, Lords and Peasants in Medieval England* at 71-72 (cited in note 126) (making a connection between chapter 27 and the interests of the church).

that appeared in Magna Carta and that had come originally from Roman law (X 3.26.16).¹⁴⁰ Ecclesiastical supervision was designed to supplement the ordinary process of property transmission to secure the orderly and fair distribution of those assets among the decedent's relatives, and also, it appears, to secure to the church that share of the estate that ecclesiastics believed any reasonable decedent would have desired. Magna Carta did not establish that the church should determine the validity of testaments, supervise the collection of assets, or secure the payment of legacies and other shares of a decedent's estate, although the church assumed these responsibilities in the probate system eventually worked out in England. But, as the canon law stood in 1215, no such right was asserted on the part of the church itself. The church's law claimed only a general right to supervise the administration of estates to secure enforcement of the charitable bequests of decedents.¹⁴¹ It is not at all surprising, therefore, that Magna Carta's chapters 26 and 27 were institutionally imprecise about what was to be done in ordinary probate matters.¹⁴² That is how the *ius commune* stood at the time.

Chapters 28 (and 30 and 31)

Nullus constabularius, vel alius ballivus noster, capiat blada vel alia catalla alicujus, nisi statim inde reddat denarios, aut respectum inde habere possit de voluntate venditoris.

No constable or other bailiff of ours shall take grain or other chattels of any person without at once tendering money therefore, unless he can have postponement thereof by permission of the seller.

These three chapters stated a principle that was to have a long and distinguished career: that the sovereign could not take property owned by his subjects without their consent unless he was willing to pay fair compensation for it. It was here applied in limited circumstances. The king promised (in ch 28) neither to take grain or other provisions, nor (in ch 30) horses or carts in-

¹⁴⁰(= 3 Comp. 2.18.13); see also Cod. 3.28.36; Nov. 18.1.

¹⁴¹See Michael M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century* 120-35 (Pontifical Institute of Mediaeval Studies 1963).

¹⁴²There is a good description of some of the uncertainties and development during this period in Norma Adams and Charles Donahue, Jr., eds, *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200-1301* 88-93 (95 Selden Society 1981).

tended for transport duty, nor (in ch 31) wood for use in the royal castles, against the will of their owners. McKechnie appropriately treated these three together, as all constitute restrictions of the king's right of purveyance.¹⁴³ All three were certainly taken from the Articles of the Barons that had been drawn up just before the events at Runnymede,¹⁴⁴ but McKechnie provided no earlier precedent for them, and as Professor Holt has pointed out, it was on the subject of purveyance that the Charter exceptionally "move[d] away from this sure ground" of the precedents provided by past practice or promise.¹⁴⁵ As he noted, "These were big issues, which were only just taking shape and were to be the source of later crises."¹⁴⁶

The sphere where these issues were not just taking shape in 1215 was the *ius commune*. In fact, what was at stake in these chapters had a direct tie to the Roman and canon laws and also to one of the most familiar stories of the day (at least among lawyers). According to the story, the Emperor Frederick I (d. 1190) had been riding in the company of the two great jurists, Martinus and Bulgarus. He asked them, "Am I the lord of the world?" Martinus replied that the emperor was indeed. Bulgarus however insisted, "You are not as to [others'] property."¹⁴⁷ Upon hearing these replies, the emperor got down from his horse, making a gift of it to the complaisant Martinus. To Bulgarus he gave nothing. The disappointed jurist had to find what solace he could in a play on words. He had, he said, "lost a horse (*equum*) because he said what was just (*equum*), which was not just (*equum*)."¹⁴⁸

This story, like many such traditional tales, was told in a number of settings. A point made in all of them was that Bulgarus had given the more courageous answer. There is a reference to it in the *gloss ordinaria* to the Codex (Cod. 7.37.3), attributing Martinus' answer to fear or affection.¹⁴⁹ Thus, commentators noticed that in a text in the Digest (Dig. 1.14.3), the emperor was said to be obliged to pay for the slave of another he had manumitted for reasons of public utility.¹⁵⁰ Although it might be

¹⁴³ McKechnie, *Magna Carta* at 329-36 (cited in note 25).

¹⁴⁴ For these Articles see Holt, *Magna Carta* at 429-40 (cited in note 5).

¹⁴⁵ *Id.* at 337.

¹⁴⁶ *Id.* at 338.

¹⁴⁷ The story is well told, with appropriate references to both the sources and modern literature, in Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* 15-19 (California 1993).

¹⁴⁸ "Amisi equum, quia dixi equum, quod non fuit equum."

¹⁴⁹ *Gl. ord.* ad Cod. 7.37.3. s.v. *omnia principis*.

¹⁵⁰ *Gl. ord.* ad id s.v. *multo magis*: "Sed an vel imperator vel populus teneatur ad pretium servi? Resp. sic, maxime si propter publicam utilitatem faciat."

said that "all things belong to the prince," this must have been meant only in the sense that all things were to be protected by him.¹⁵¹ The contemporary canon law upheld the same principle where the emperor sought to take goods belonging to the church. These belonged to God. They were beyond the emperor's legitimate reach (C. 33 q. 8 c. 21).

It may appear to have been an ostentatious show of learning when the great early eighteenth century American judge, Chancellor Kent, added the authority of Grotius, Puffendorf, and Bynkershoek to that of Magna Carta in forbidding a taking of private property without compensation by the State of New York.¹⁵² Perhaps there was a hint of pretension on his part. On the other hand, if my argument is correct, there was also a certain appropriateness in Kent's choice of citation. These jurists stood within the continuing traditions of the *ius commune*. They may point towards one of the ultimate sources of chapters 28, 30, and 31.¹⁵³

Chapter 35

Una mensura vini sit per totum regnum nostrum, et una mensura cervisie, et una mensura bladi; . . . de ponderibus autem sit ut de mensuris.

Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn; . . . of weights also let it be as of measures.

This chapter, dealing with what we call weights and measures, attempted to establish a uniform, and presumptively fair, standard for trade throughout the realm. It stated that such uniform standards should be established and provided the measures to be used; this was one of those plans for the future the drafters hoped would come to pass naturally. Legislation in this area of human economic life was not unprecedented in 1215. Royal inter-

¹⁵¹ Id: "quia licet omnia principis intelligantur, verum est quo ad protectionem." See generally Jacob Sieber, *Das Recht der Expropriation mit besonderer Berücksichtigung der schweizerischen Rechte* 10-15, 97-100 (Orell Füssli 1889).

¹⁵² *Gardner v The Trustees of the Village of Newburgh, and Habrouck and Belknap*, 2 Johns Ch 162, 166 (NY Ch 1816). On Kent's habits in this regard, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Colum L Rev 547, 566-70 (1993).

¹⁵³ See generally John F. McGovern, *Private Property and Individual Rights in the Commentaries of the Jurists, A.D. 1200-1550*, in Steven B. Bowman and Blanche E. Cody, eds, *In Iure Veritas: Studies in Canon Law in Memory of Schafer Williams* 131 (Cincinnati 1991).

vention to deal with the problem of false weights and measures extended back into Anglo-Saxon times,¹⁵⁴ and statutes were enacted by Parliament with the same goal in mind long after 1215.¹⁵⁵ The most that can honestly be said, therefore, is that the *ius commune* may have provided some of the impetus for including this particular chapter in Magna Carta.

That much, however, *can* be said. In a way, it already has been said—by Sir Edward Coke. In his opinion, this chapter was “grounded upon the law of God.”¹⁵⁶ He provided a text from the Book of Deuteronomy (25:13-15) on which to base his assertion of its divine provenance. He might also have cited, as many clerics were later to do, the sentiments expressed in Proverbs 11:1-2: “A false balance is abomination to the Lord, but a just weight is his delight.” In this area of the law, as in most others at the time, commentators drew no strict line between religious and economic spheres of life.¹⁵⁷

Perhaps it seems only natural, therefore, to find that the canon law itself contained texts intended to guarantee the integrity of weights and measures. In any event, it did. Early papal decretals stated a rule imposing a penance of thirty days of bread and water on those who knowingly changed the uniform course of just measures (X 3.17.2).¹⁵⁸ A similar rule was even found by the medieval jurists in a Roman law text that condemned any person who corrupted the established measures of grain, corn, or “any other thing,” mentioning specifically a decree by the Emperor Hadrian punishing with relegation to an island anyone “who had falsified weights or measures” (Dig. 48.10.31). As in the wording of that decree, the commentators also were accustomed to linking “weights” and “measures” together in their treatments of the subject.¹⁵⁹ The language they used tracks that at the end of chapter 35. It is informative to note that Magna Carta’s treatment of this subject was more detailed and more specifically related to English conditions than were the basic operative texts of the *ius*

¹⁵⁴ VI Aethelred ch 28 § 2, in A.J. Robertson, ed, *The Laws of the Kings of England from Edmund to Henry I* 100 (Cambridge 1925). See McKechnie, *Magna Carta* at 356 (cited in note 25).

¹⁵⁵ For example, 14 Edw III, st 1, ch 12 (1340), 285, and 25 Edw III, st 5, chs 9, 10 (1351-52), 321, in 1 *Statutes of the Realm* (1810); 1 Hen V, ch 10 (1413), 174, and 8 Hen VI, ch 5 (1429), 241-42, in 2 *Statutes of the Realm* (1816).

¹⁵⁶ Coke, 1 *Second Institute* at 41 (cited in note 12).

¹⁵⁷ See generally John Witte, Jr., *A New Concordance of Discordant Canons: Harold J. Berman on Law and Religion*, in Howard O. Hunter, ed, *The Integrative Jurisprudence of Harold J. Berman* 99, 114-20 (Westview 1996).

¹⁵⁸ (= 1 Comp. 3.15.3).

¹⁵⁹ For example, *gl. ord.* ad X 3.17.2 s.v. *Nota quod*.

commune. But its motivation, its intended results, and even some of its specific language, were no different.

Chapter 38

Nullus ballivus ponat de cetero aliquem ad legem simplicis loquela sua, sine testibus fidelibus ad hoc inductis.

No bailiff shall in the future put anyone to his law upon his own word, without faithful witnesses brought for that purpose.

The apparent purpose of chapter 38 was to keep royal bailiffs from bringing or hearing criminal charges against defendants unless the charges were supported by competent evidence against them. That end was to be achieved by making sure that the evidence came "from faithful witnesses."¹⁶⁰ The term "law" in chapter 38 meant a purgatory oath, what English lawyers called "wager of law" and civilians called "canonical purgation." In this process, the initial oath was taken by the defendant; he swore that he was not guilty of the charge brought against him. Normally, though not always, he was required to find a number of compurgators, who were willing to swear to their own belief in the veracity of his oath.

Legal historians have not made much of this particular chapter. About it Coke cited some language from *Bracton* that comes from the *ius commune*, but he quickly moved on to the related question of the use of wager of law in actions of debt.¹⁶¹ The lack of sources from within the English common law certainly must have encouraged a quick transition to another subject. The *testis*, although not unknown, was not a frequent figure in litigation at early common law.¹⁶² In most contexts, a *testis* was the guarantor of the authenticity of a document; his name was found at its foot. *Sectatores* or suitors would have been the more natural term in the common law for what chapter 38 meant.¹⁶³ To make the presence of *testes* a condition precedent in criminal cases, one that would be necessary before royal officials could require anyone to

¹⁶⁰ Holt, *Magna Carta* at 326, 460 (cited in note 5) ("testibus fidelibus").

¹⁶¹ See Coke, 1 *Second Institute* at 44-45 (cited in note 12).

¹⁶² James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 17-24 (Little, Brown 1898, repr Rothman 1969).

¹⁶³ See S.F.C. Milsom, *Historical Foundations of the Common Law* 285-86 (Butterworths 2d ed 1981); Reeves, 2 *History of the English Law* at 38-39 (cited in note 4); Oliver Wendell Holmes, Jr., *The Common Law* 207 (Harvard 1963) (Mark De Wolfe Howe, ed).

submit to compurgation, appears to be a decidedly odd choice on the part of English drafters.

By contrast, the word *testis* would have been the natural term for a jurist coming from experience with the *ius commune*. All of the five *Compilationes antiquae* of the canon law contained titles called *De testibus*.¹⁶⁴ So did the three principal parts of the *Corpus iuris civilis*.¹⁶⁵ The word would have come quickly to the mind of any civilian; the testimony of witnesses was the basic way of establishing facts in the *ius commune*. The wording of the chapter, in this respect at least, seems to come from a drafter who was familiar with the term.

As to the substance of the chapter, McKechnie, whose treatment of Magna Carta's provisions has provided the starting point for most modern discussion, presented a bewildering collection of the possible interpretations that had been advanced over the years.¹⁶⁶ None fully convinced him. What actual precedent could be found in fact had an ecclesiastical connection—Henry II's Constitutions of Clarendon insisted that the rule be observed in ecclesiastical courts.¹⁶⁷ Most recent commentators understandably have passed over this chapter without dealing at any length with the question of its sources.¹⁶⁸

No doubt an additional reason for not going into the question has been that the chapter's provisions were obsolete almost from the start. Presentment and private appeal were the principal means of beginning a criminal prosecution in English law, not prosecution by a bailiff on information furnished by witnesses.¹⁶⁹ As early as the opening years of the fourteenth century, English lawyers were themselves uncertain about exactly what the chapter meant.¹⁷⁰ The evident fact was that its wording had no clear correspondence with the established institutions of the common

¹⁶⁴ 1 Comp. 13.1-25; 2 Comp. 12.1-5; 3 Comp. 12.1-14; 4 Comp. 7.1-6; 5 Comp. 12.1-5.

¹⁶⁵ Cod. 4.20.1-20; Dig. 22.5.1-25; Nov. 90.

¹⁶⁶ McKechnie, *Magna Carta* at 369-75 (cited in note 25).

¹⁶⁷ Stubbs, *Select Charters* at 165 (cited in note 56). For recognition of the connection see W.L. Warren, *The Governance of Norman and Angevin England 1086-1272* 167 (Stanford 1987); T.F.T. Plucknett, *The Medieval Bailiff* 12 (London 1954).

¹⁶⁸ See Holt, *Magna Carta* (cited in note 5). The solitary reference to it in his book's text is that given above. See note 160.

¹⁶⁹ See Christopher Whittick, *The Role of the Criminal Appeal in the Fifteenth Century*, in J.A. Guy and H.G. Beale, eds, *Law and Social Change in British History* 55 (Royal Historical Society 1984); Daniel R. Ernst, *The Moribund Appeal of Death: Compensating Survivors and Controlling Jurors in Early Modern England*, 28 Am J Legal Hist 164 (1984); Daniel Klerman, *Private Prosecution of Crime in Thirteenth-Century England* (unpublished Ph.D. dissertation, University of Chicago 1998).

¹⁷⁰ See Alfred J. Horwood, ed, *Year Books of the Reign of King Edward the First. Years XXXII-XXXIII* 516 (31a:4 Rolls Series 1864, repr Kraus 1964).

law. Even in 1215, one may think, it would not have been certain exactly how this provision was to fit in with ordinary practice.

All these puzzles melt away if one looks at the contemporary *ius commune* and considers it as a source for chapter 38. Involved was one of the most frequent and controversial questions of the day: Could a criminal prosecution be brought against a defendant on the basis of public suspicion, or was the ancient procedure that called for the presence and action of an actual accuser to be followed?¹⁷¹ The canonists hesitated. On the one hand, there stood the urgent need to deter crime and punish criminals. The established procedure of private accusation had proved insufficient for the task. On the other hand, to allow officials to carry out criminal prosecutions on the basis of what might be no more than rumor could easily violate important norms of fairness. It might also create more problems than it solved.

Gratian devoted a long *Quaestio* in the *Decretum* to the subject; he began with a statement of law similar in its substance to that in Magna Carta's chapter 38: "Lacking accusers, it seems that defendants are not to be compelled to purgation."¹⁷² Another text selected by Gratian condemned sentences given in the absence of confession by the accused or conviction "by blameless witnesses" (C. 2 q. 1 c. 2). In similar fashion, a contemporary decretal of Pope Clement III (d. 1191) denied the lawfulness of putting a cleric to canonical purgation simply on the voice of one witness.¹⁷³ More than one trustworthy witness was necessary for most purposes under the *ius commune*. It was a rule for which biblical roots were readily found (for example, Deut. 17:6, Matt. 18:16), and although the canonists developed many exceptions to it over the course of centuries, the requirement of two witnesses or the equivalent remained a cornerstone of the civilian law of proof.

There is one other point. According to the ancient canons, oaths were not to be sworn indiscriminately. Unless there were reliable evidence against a person, it would be wrong to put the onus of proving his innocence upon him, particularly if he would be required to take an oath in the process (C. 22 q. 1 c. 13). This

¹⁷¹ Winfried Trusen, *Der Inquisitionsprozeß. Seine historischen Grundlagen und frühen Formen*, in Th. Mayer-Maly, et al, eds, 74 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kanonistische Abteilung* 168, 168-230 (1988); Richard M. Fraher, *The Theoretical Justification for the New Criminal Law of the High Middle Ages: "Rei publice interest, ne crimina remaneant impunita"*, 1984 U Ill L Rev 577.

¹⁷² D. a. C. 2 q. 5: "Deficientibus vero accusatoribus reus non videtur esse cogendus ad purgationem."

¹⁷³ 2 Comp. 5.15.1.

is exactly what too easy assignment of purgation would do. It would compel someone to take an oath, thereby falling under temptation to commit the sin (and crime) of perjury, without the existence of the necessity that was thought to excuse this apparent violation of a biblical command (d. a. C. 22 q. 1 c. 1). It looks possible, therefore, that chapter 38 of Magna Carta may best be explained as a borrowing of this idea from the canon law. In the *ius commune*, oaths were required of defendants only where some credible evidence against them already existed—that was regarded as the source of the necessity—and as with most other matters, such evidence had to come from two faithful witnesses unless there was other corroborating indication of guilt.¹⁷⁴ That was, in substance, what chapter 38 enacted.¹⁷⁵ Unless one makes this connection with the law of the church, the import of the chapter remains mysterious.

Chapters 40 (and 36)

Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.

To no one will we sell, to no one will we refuse or delay, right or justice.

Chapter 40 contains the King's promise neither to sell nor deny nor delay justice to his subjects. Explaining the genesis and the meaning of this chapter (and also of chapter 36, which promised to take nothing for writs of inquest concerning life or limb) has long presented a problem for historians of Magna Carta. Although the king's duty to do justice was a commonplace of medieval life, no provision that he should perform that duty *gratis* is to be found in earlier statements of English law.¹⁷⁶ Explaining this

¹⁷⁴ X 2.20.23.

¹⁷⁵ The full story of later development is more complicated. Ultimately, both the canon law and the English common law adopted different practices, the former taking the road of the inquisition, the latter that of the grand jury. Both continued to confront the same problem of abuse by officials, and both dealt with it after a fashion. In the canon law, if there were legitimate suspicion against a person, suspicion that did not have its origins among the person's enemies or among persons of ill fame, and if this suspicion were held by good and substantial members of the community where the person lived, particularly if that suspicion had generated "scandal" among the people, then the person suspected should be put to his purgation. Otherwise not. In other words, in the fully developed canon law a specific accuser or a "faithful witness" was not required to begin a criminal prosecution. The opposite had been the old law.

¹⁷⁶ The explanation offered in Richard fitz Nigel, *Dialogus de Scaccario* bk 3, ch 23 at 120 (Thomas Nelson 1950) (Charles Johnson, ed and trans), drawing a distinction between simply doing justice and doing justice "sine dilatione," has been regarded (rightly I think)

feature of these chapters is all the harder because its promise is so clearly contradicted by English legal practice, both before and after Magna Carta. The King *did* sell justice. Writs cost money. And no move was made to change this aspect of the system of issuing royal writs in the wake of adoption of Magna Carta. Unless one is prepared to accept a distinction between "selling justice" and "profiting from judicial agencies,"¹⁷⁷ the words of the chapter are hard to understand. For most commentators on Magna Carta, therefore, it has been necessary to read out the heart of what this chapter says on its face and convert it into a promise to provide a system of justice in return for "reasonable rates" or simply to guarantee the principle that justice would be done promptly and fairly.¹⁷⁸ That is the treatment found in McKechnie's classic account, as it had been in Coke's *Institutes*.¹⁷⁹ In truth, commentators have had very little alternative if they were to give the chapter any meaning at all.

A more satisfactory alternative comes from taking seriously the possibility of influence by the *ius commune*. In the canon law, the principle that justice should be rendered freely and without payment was frequently stated. Gratian, for instance, raised the question of whether a judge who accepts a *premium* for his sentence could be called a *bonus iudex*. The answer given by the text and the glosses was clear. He could not. "He who takes a reward in recompense perpetrates a fraud upon God" (C. 11 q. 3 c. 66). It did not matter if his sentence was just. It was his "sale" of justice that was the wrong. The love of justice, not money, must be the source of the sentence.¹⁸⁰ Another text in the *Decretum* (C. 1 q. 3 c. 10) proclaimed that justice was a gift of God, and noted, "He who sells or purchases a gift of God is condemned by God."¹⁸¹ In-

as too sophisticated to explain this provision. See the comments in Warren, *The Governance of Norman and Angevin England* at 166-67 (cited in note 167). Warren regards the chapter as stating a rule against discriminating among litigants in the doing of justice.

¹⁷⁷ See F.W. Maitland, *The Constitutional History of England* 93 (Cambridge 1909) (H.A.L. Fisher, ed).

¹⁷⁸ See Joseph H. Smith, *Cases and Materials on the Development of Legal Institutions* 202 note (West 1965) (stating it was significant for "eliminating bargaining and fixing a right in litigants to have writs for a reasonable fee"). See also F.E. Dowrick, *Justice according to the English Common Lawyers* 20 (Butterworths 1961); A.E. Dick Howard, *Magna Carta: Text and Commentary* 15 (Virginia 1964). This is, however, the chapter in which Professor Holt mentions the possibility of canonical influence. See Holt, *Magna Carta* at 285-86 (cited in note 5).

¹⁷⁹ See McKechnie, *Magna Carta* at 395-98 (cited in note 25); Coke, 1 *Second Institute* at 55-56 (cited in note 12).

¹⁸⁰ *Gl. ord.* ad id s.v. *qui recte*: "[N]on quia non amor iustitiae, sed pecunia illud ad veritatem provocavit."

¹⁸¹ "Qui dona Dei vendunt vel emunt pariter a Deo damnantur." The question was inevitably tied up with simony, the buying and selling of the sacraments and offices of the

deed in several places in the *Decretum* the same wording appears that one finds in Magna Carta's chapter 40. Judges were to administer justice without taking any reward in return (X 3.1.10). To "sell justice" was a practice the canon law specifically, repeatedly, and roundly condemned.¹⁸²

The medieval jurists who dealt with these texts did not in the end understand them as forbidding the payment of what we would describe as court costs. Even less did they regard the system of ecclesiastical justice that actually came into being as fulfilling the ideal embodied in these statements from the *Decretum*. In matters like these, the jurists were as sophisticated as we are, and ways were ultimately found to harmonize these idealistic sentences with a functioning legal system.¹⁸³ This is the point. The same need for sophisticated interpretation came into play. It was as necessary in English practice as it was within the *ius commune*, and lawyers eventually supplied it. If one takes the words of Magna Carta's chapter 40 at face value, however, the text remains very hard to understand. What sane lawmaker could have promised to provide a costless system of justice? However, if one recognizes that chapters 40 and 36 in fact restated in an English secular context a rule taken from the *ius commune*, a wider scope for understanding and criticizing the chapter emerges.

Chapters 41 (and 42)

Omnes mercatores habeant saluum et securum exire de Anglia, et venire in Angliam, et morari et ire per Angliam, tam per terram quam per aquam, ad emendum et vendendum, sine omnibus malis toltis, per antiquas et rectas consuetudines, preterquam in tempore gwerre, et si sint de terra contra nos gwerrina; et si tales inueniantur in terra nostra in principio gwerre, attachientur sine dampno corporum et rerum, donec sciatur a nobis vel capitali iusticiario nostro quomodo mercatores terre

Church, in the minds of the jurists. See, for example, Rufinus of Bologna, *Summa* ad C. 11 q. 3 c. 57, 319 (cited in note 74).

¹⁸² See also C. 14 q. 5 c. 15: "Sed non ideo debet iudex vendere iustum iudicium." See also d. p. C. 2 q. 6 c. 41 § venales; X 5.34.16 and *gl. ord.* ad id s.v. *venditionem*.

¹⁸³ See *gl. ord.* ad X 3.1.10 s.v. *praeter expensas*. See generally James A. Brundage, *No Fee, No Law: Taxation of Costs in Medieval Canonical Courts*, in *L'Assistance dans la résolution des conflits* 33 (64:3 Recueils de la Société Jean Bodin 1997); John W. Baldwin, *Masters, Princes and Merchants: The Social Views of Peter the Chanter and his Circle* 191-92 (Princeton 1970); John T. Noonan, Jr., *Bribes* 232-33 (Macmillan 1984).

nostre tractentur, qui tunc invenientur in terra contra nos gwerrina; et si nostri salvi sint ibi, alii salvi sint in terra nostra.

All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, of how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.

Chapter 41 of the Great Charter stated that all merchants were to enjoy safe and secure access to English markets, freedom from "evil tolls," and even a measure of protection from exploitation in time of war. Chapter 42 guaranteed a measure of freedom to travel to all subjects, both into and out of England, with appropriate exceptions to deal with criminals and with the special problems that always exist in wartime. Montesquieu himself was to praise these chapters as enacting the "spirit of commerce" that led to peace among nations.¹⁸⁴

Explaining the origins of these two chapters, however, has been difficult for historians—most obviously because the chapters were very largely unprecedented in English law or custom. Control of foreign commerce had been a matter of uncontrolled royal prerogative. It was widely felt among the barons that John had abused his undoubted prerogative by treating it simply as a source of personal profit, but there was nothing in existing law to curb this abuse. Historians have, therefore, treated chapters 41 and 42 as inventions. Even this has not seemed a wholly satisfactory explanation, however. Attributing motivation for including this chapter to either the merchants of London or to the English barons attributes to them an interest in free trade that was as contrary to the self-interest of the former as it was beyond the ken of the latter. The source of the chapters has remained something of a puzzle in consequence.¹⁸⁵

¹⁸⁴ Montesquieu, *The Spirit of the Laws* pt 4, ch 14 at 346-47 (Cambridge 1989) (Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, eds and trans).

¹⁸⁵ Professor Holt also calls attention to the parallel between the substance of this

If one looks at the contemporary *ius commune* as a source of inspiration, however, the puzzle very largely disappears. Merchants enjoyed special privileges in the *ius commune*. The *Codex* in the Roman law contained two titles in its fourth book (Cod. 4.60 and 4.61), both affirming the right of merchants to unimpeded access to their markets. The parallel is very close. The canon law also contained provisions designed to provide "appropriate security" in order to protect "merchants in their comings and goings" (X 1.34.2).¹⁸⁶ According to commentators on the *ius commune*, merchants were "canonically owed a perpetual truce."¹⁸⁷ In effect, this was very like what chapter 41 guaranteed to them.

None of the laws and canons in the *ius commune* expressly distinguished between foreign and domestic merchants, and again that is just the pattern one finds in Magna Carta's chapter 41. This consolidation of the two classes of merchants is found at the start of the chapter, despite the established usage in English law of drawing a distinction between them and varying the rights they enjoyed. On this point chapter 41 was identical to the *ius commune*, and a limitation of the chapter to foreign merchants had later to be "read into" the Great Charter to make it fit English conditions.¹⁸⁸ The parallel is also close on the subject of taxation. The Roman laws included in the *Codex* expressly limited the taxes that could be collected from merchants, affirming their rights to be subjected only to the "ancient customs" on this score. The wording here tracked that of Magna Carta.¹⁸⁹ The rule was stated in *ipsissimis verbis*.

The parallels go a little further still. The provisions of the *Codex* drew a distinction between wartime commerce with nations that were enemies and commerce with those that were not,

chapter and common insertion in municipal charters of provisions to secure some measure of freedom of trade. *Magna Carta* at 57 (cited in note 5).

¹⁸⁶ (= 1 Comp. 1.24.2), from Lateran III, ch 22. For a more general treatment of merchants in the canon law, see Vito Piergiovanni, *Il Mercante e il Diritto canonico medievale: 'Mercatores in itinere dicuntur miserabiles personae'*, in Stanley Chodorow, ed, *Proceedings of the Eighth International Congress of Medieval Canon Law* 617-31 (Biblioteca Apostolica Vaticana 1992).

¹⁸⁷ Geoffrey of Trani, *Summa super titulis Decretalium* tit *De treuga et pace*, no 3 (Lyon 1519, repr Scientia Verlag 1992) ("Et est sciendum quod certe sunt persone quibus perpetuo canonice treuge debentur ut sunt . . . mercatores."). See also Wilfrid Trusen, *Die gelehrte Gerichtsbarkeit der Kirche*, in *Gelehrtes Recht im Mittelalter und in der frühen Neuzeit* 343, 361 (Keip Verlag 1997).

¹⁸⁸ Most notably by Coke, 1 *Second Institute* at 57 (cited in note 12) ("Omnes mercatores]. This chapter concerneth merchant strangers.").

¹⁸⁹ Compare Cod. 4.61.4, forbidding the exaction of *vectigalia* if "ultra antiquam consuetudinem," with Magna Carta's prohibition of "evil tolls" that were not measured "per antiquas et rectas consuetudines."

a difference that one also finds, albeit in slightly different words, in Magna Carta.¹⁹⁰ Chapter 42's extension to other subjects of a blanket permission to travel outside England was also important to the clergy and to full enforcement of the canon law. King Henry II had sought to restrain their freedom to travel outside England in the Constitutions of Clarendon (1164).¹⁹¹ The attempt was long remembered as an unlawful attempt to restrict appeals to the papal court, a right guaranteed under the canon law (C. 2 q. 6 c. 3). In 1215 it would have surprised few observers to find this extension of a grant of the freedom of movement being advanced as part of a clerical agenda.¹⁹²

The Charter contained one other feature that perplexed later commentators: the failure to distinguish between aliens and denizens, the latter being aliens who were given some of the privileges of native born Englishmen by grant of the crown. This was an important distinction in the history of the mercantile law of England. The two were always treated differently. Magna Carta made no mention of it. Here again the failure follows what was found in the *ius commune*: No such distinction was to be found in its texts. Thus, these two chapters of Magna Carta seem remarkably close in substance to what was found in the Roman and canon laws. The "negative" parallels extend to several omissions in the Charter that might seem to have been called for by the English situation. They should be considered together with the "positive" verbal parallels and the similarities in aim. Taken together, they suggest a connection between Magna Carta and the contemporary *ius commune*.

Chapter 45

Nos non faciemus justiciarios, constabularios, vicecomites vel ballivos, nisi de talibus qui sciunt legem regni et eam bene velint observare.

We will appoint as justices, constables, sheriffs, or bailiffs only those who know the law of the realm and mean to observe it well.

¹⁹⁰ See Cod. 4.60.8, and esp *gl. ord.* ad id s.v. *devotarum*: "aliud in legatis hostium, quia cum illis non est commercium."

¹⁹¹ Ch 4, in Stubbs, *Select Charters* at 165 (cited in note 56).

¹⁹² See Edward Coke, *Third Part of the Institutes of the Laws of England* 178-79 (W. Clarke 1809) (giving reasons for restricting the clergy's rights to travel). The provision was dropped from the reissue of the Charter in 1217.

Chapter 45, one of the least satisfactory chapters of Magna Carta from a modern lawyer's perspective, proclaimed that the king would appoint as judges only men who "knew the law and meant to observe it." McKechnie described this chapter as "well-meaning" but otherwise hopelessly unsatisfactory, because it lacked any standards of measurement and any means of securing its enforcement. These omissions must explain why this chapter was dropped from later editions of the Great Charter. The motivation for including the chapter in the first place, he thought, must have sprung from the conservatism of the barons and their dislike of the king's foreign favorites. "[T]he barons did not desire that John should employ men steeped in legal lore," McKechnie wrote, "but plain Englishmen with a rough-and-ready knowledge of insular usage."¹⁹³

It undoubtedly would have seemed unlikely to McKechnie's "plain Englishmen" to think that the contemporary *ius commune* could have been the same in this particular. They would have taken note that the Roman and canon laws are (and were) known as "the learned laws," and very likely they would have supposed that something more exacting—some university degree, some verifiable standard of legal training, or at least some stated period of apprenticeship—would have been required of judges within the Continental tradition. This, however, was not the fact. The principle that judges must know the law existed in the *ius commune*. It was stated more than once in the texts. However, neither a requirement of university education in law nor even objective standards for ascertaining the existence of the requisite knowledge existed. This absence, coupled with an absence of a mechanism for enforcing the requirement of knowledge, were in fact virtually identical to those in chapter 45.

Perhaps the absence of educational requirements was an inheritance of the Roman law, in which judges had originally been private individuals rather than magistrates. It was, at any rate, the reality in the *ius commune* as it stood in 1215. Thus in the *Codex* (Cod. 3.1.17), *scientia legis* was required of judges. But no special background or degree was mentioned. Even *milites* were said to have been capable of acting as judges if they had sufficient experience in judging causes. Similarly, in the *Decretum Gratiani* (De pen. Dist. 6 c. 1 § 3): judges must "know of that which they are to judge."¹⁹⁴ The text did not say how they were to acquire that knowledge. To the same effect were the relevant papal decre-

¹⁹³ McKechnie, *Magna Carta* at 432 (cited in note 25).

¹⁹⁴ Another example: C. 2. q. 2 c. 6, approving of judges "recta sapientes."

tals (for example, X 4.14.1): judges must “not be ignorant of the law.” But again, this was all. The standards were as general as those of Magna Carta. Knowledge of the law was required, but no specific academic training or other professional qualification was required under the *ius commune* as it stood in 1215.

Moreover, at least in the case of ordinary jurisdiction, no way of objecting to a lack of expertise on the part of any specific judge was made available to litigants in the *ius commune*. McKechnie’s requirement—that there have been some realistic “means of enforcement” if the Charter’s provision was to have any effect—was equally lacking there. His position does seem sensible. The absence of a practical way of implementing the requirement of sufficient learning in the law is otherwise incongruous, even within canonical traditions. By contrast, contemporary canon law was emphatic about the necessity of proper personal jurisdiction over the parties. A sentence given without formal jurisdiction, for example, was treated a nullity, and it was open to litigants to raise an objection to a court’s jurisdiction even after sentence. However, about the degree of legal expertise required of its judges, the *ius commune* was virtually identical in substance to Magna Carta’s chapter 45. Men without formal legal training could act as judges, provided they knew the law. No formal exception could be taken for the judge’s lack of training. The parallel in substance is close.

Chapters 52 (and 57)

Si quis fuerit disseisitus vel elongatus per nos sine legali iudicio parium suorum, de terris, castellis, libertatibus, vel jure suo, statim ea ei restituemus; et si contentio super hoc orta fuerit, tunc inde fiat per iudicium viginti quinque baronum, de quibus fit mencio inferius in securitate pacis. De omnibus autem illis de quibus aliquis disseisitus fuerit vel elongatus sine legali iudicio parium suorum, per Henricum regem patrem nostrum vel per Ricardum regem fratrem nostrum, que in manu nostra habemus, vel que alii tenent, que nos oporteat warrantizare, respectum habebimus usque ad communem terminum cruce signatorum; exceptis illis de quibus placitum motum fuit vel inquisicio facta per preceptum nostrum, ante suscepcionem crucis nostre; cum autem redierimus de peregrinatione nostra, vel si forte remanserimus a peregrinatione nostra, statim inde plenam justiciam exhibebimus.

If anyone has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if any disagreement arises on this, then let it be settled by the judgment of the Twenty-Five barons referred to below in the security clause. But for all those things of which anyone was disseised or deprived without lawful judgement of his peers by King Henry our father, or by King Richard our brother, which we hold in our hand or which are held by others under our warranty, we shall have respite until the usual term of crusaders; excepting those things about which a plea has been raised, or an inquest made by our order, before our taking of the cross; but as soon as we return from our expedition (or if perchance we desist from the expedition) we will immediately grant full justice therein.

Chapters 52 and 57 are among Magna Carta's least known provisions, but they were undeniably important to the participants, and they undoubtedly contained ingredients identical to those in the *ius commune*. In them, John promised to restore property wrongfully taken by the crown, including property taken by his father, Henry II, and his brother, Richard I. Some of this property had been retained in John's hands as if by right of inheritance. Restoration of such property was not of course a goal peculiar to the canon law, although it most certainly was one feature of it. Restoration was part of the doing of ordinary justice. However, in one respect the canon law must have influenced the formulation of the two chapters. They both specifically reserved to John a respite from this obligation during the "common term of crusaders." John had taken the cross on the fourth of March 1215, and he was entitled under the law of the church to what was called the "crusader's respite." This was a canonical privilege, one that came also to be widely recognized under temporal law.¹⁹⁵ It was not simply a policy-driven inducement to assume the status of a crusader. The privilege was fashioned from the rights of soldiers under the Roman law (Dig. 4.6.7, 15), the church's traditional indulgence towards pilgrims (C. 24 q. 3 c. 23),¹⁹⁶ and the procedural rule forbidding innovation while an ap-

¹⁹⁵ See, for example, the French parallel (1188), in François Delaborde, ed, 1 *Oeuvres de Rigord et de Guillaume le Breton, Historiens de Philippe-Auguste* 86-88 (Société de L'Histoire de France Paris 1882).

¹⁹⁶ See Louis Carlen, *Wallfahrt und Recht im Abendland* 137-40 (Universitätsverlag

peal was pending (X 2.28.1).¹⁹⁷ In effect, it suspended most legal actions against absent crusaders (d. p. C. 3 q. 3 c. 4).

In the years around 1200, the term during which that suspension lasted was a matter of uncertainty and debate among the commentators—the possible alternatives ranging from nine months to as long as the Crusade continued.¹⁹⁸ It is noteworthy that the chapters of the Great Charter also left this question of duration uncertain; the drafters contented themselves with the vague formulation, “the common term.” How long that term actually was, they were obliged to leave unstated. That reflected how the matter stood at the time in the canon law. Equally telling is the exception placed in chapters 52 and 57 for litigation that was already underway. Disputes that had reached the point of being heard in the courts were not covered by the respite allowed to King John. They were also excluded from the crusader’s respite under the *ius commune*.¹⁹⁹ Thus, both positive and negative aspects of the coverage of the crusader’s respite turn out to have been very largely identical.

On the other hand, these chapters in Magna Carta were not entirely identical with the canon law. The respite was allowed to John only for disputed claims over property taken by his two immediate predecessors. It was not allowed for property he had taken himself where his own action was involved. It is possible to draw an analogy to the canon law’s privilege here—there are in fact similarities. However, it seems more sensible to see this as one example of a feature found in several of the chapters: intelligent *use* of the canon law. The *ius commune* was drawn upon by the drafters, but it was not always copied. The drafters felt themselves free to adapt the solutions of the *ius commune*, even to reject them entirely when they did not fit local needs.

Legal ideas are often transformed when they are taken from one system into another.²⁰⁰ Sometimes this happens as if by acci-

Freiburg Schweiz 1987); Henri Gilles, *Lex peregrinorum*, in Édouard Privat, ed, *Le pèlerinage* 172-79 (15 Cahiers de Fanjeaux 1980); F. Garrisson, *A propos des pèlerins et de leur condition juridique*, in 2 *Études d'histoire du droit canonique dédiées à Gabriel Le Bras* 1165 (Sirey 1965); Emile Bridrey, *La condition juridique des croisés et le privilège de croix: Etude d'histoire du droit français* 152-71 (Giard & Brière 1900).

¹⁹⁷ (= 1 Comp. 2.20.1); see also *gl. ord.* ad X 1.29.10 s.v. *restitutionem*.

¹⁹⁸ These are given in James A. Brundage, *Medieval Canon Law and the Crusader* 172-74 (Wisconsin 1969).

¹⁹⁹ See the discussion and authorities cited in the *gl. ord.* ad X 1.29.10 s.v. *nisi is*, or Hostiensis, *Lectura* ad id no 2. Under the canon law the *litis contestatio* was the determining moment; this would not have been appropriate (or possible) in the English context, and these chapters make the “moving” of the cause or the holding of an inquest the decisive point.

²⁰⁰ Alan Watson, *Aspects of Reception of Law*, 44 Am J Comp L 335, 345 (1996).

dent. But not always. Sometimes the people involved take only what they need or only what seems to them to suit their own predilections or situations. It is the argument of this Article that something like this purposefully creative use of ideas found in the *ius commune* happened with respect to the crusader's privilege.

Chapter 54

Nullus capiatur nec imprisonetur propter appellum
femine de morte alterius quam viri sui.

No one shall be arrested or imprisoned upon the appeal
of a woman, for the death of any other than her husband.

With chapter 54, one enters more uncertain territory. The chapter has long puzzled commentators.²⁰¹ This provision restricted the power of women to bring about the imprisonment of any person by bringing a criminal appeal, limiting their power to cases involving the death of their husbands.²⁰² This rule was not wholly unprecedented in English law. *Glanvill* contained a similar prohibition.²⁰³ The most one could reasonably suppose, therefore, is that the *ius commune* played something like a supplementary role in securing its inclusion in Magna Carta.

When one does make that supposition, comparing chapter 54 with the contemporary canon and Roman laws, a similarity surfaces that makes the comparison suggestive. This chapter appears to be an application, within an English setting, of a prohibition found in the learned laws—the restriction of the *ius accusandi* for women to cases for injury to their own immediate interests. It was regarded as a consequence of the *fragilitas sexus* that was traditional in Continental law.²⁰⁴ Both the Roman law

²⁰¹ Holt, *Magna Carta and the Origins of Statute Law* at 297 n 23 (cited in note 2), succinctly describes the puzzle. See also J.M. Kaye, ed, *Placita Corone or La Corone Pledee devant Justices xxviii-xxxii* (4 Selden Society Supp Series 1966).

²⁰² See McKechnie, *Magna Carta* at 453 (cited in note 25), for evidence on the ability of women to bring appeals of rape, not mentioned in the 1215 document, but apparently understood to exist.

²⁰³ See *Glanvill*, bk XIV, ch 3, in Hall, ed and trans, *Tractatus de legibus et consuetudinibus* 174 (cited in note 137). *Glanvill* gives a reason for allowing the wife to bring an appeal against the killer of her husband: the two had become one flesh in marriage, and hence the injury was to her as much as to him. The argument was stronger that the wife should be allowed to bring an appeal for rape where she was the victim. Id at bk XIV, ch 6.

²⁰⁴ Guido Rossi, *Statut juridique de la femme dans l'histoire du droit italien: Époque médiévale et moderne*, in *La femme* 115, esp 131-32 (12:2 Recueils de la Société Jean Bodin 1962).

Digest,²⁰⁵ and Gratian's *Decretum*,²⁰⁶ contained texts stating this principle. Women were allowed to initiate criminal accusations, but only where they were pursuing a direct injury to themselves or to their immediate family. It fit the assumptions of the canon law that women should be given a more restricted right to make criminal accusations than men (d. p. C. 32 q. 1 c. 10). Under the church's view, it was only in the special case where this should happen.

Magna Carta's chapter 54 rests upon this same assumption. Indeed it enacted the identical rule, applied in the context of a right to cause the appellee's imprisonment. In English common law, the cases where married women were regarded as having suffered direct injury were exactly those mentioned (or understood) in this chapter. Murder of a woman's husband was the clearest case of direct injury to her interest. The disparity between this provision and what actually happened in English practice, where women were commonly accorded greater rights to initiate criminal appeals than chapter 54 permitted,²⁰⁷ must make the suggestion of influence from without even more plausible.

There was thus a close parallel between this chapter of Magna Carta and the provisions of the *ius commune*. Indeed the parallel is actually closer than it appears at first sight, although the additional evidence may not bear immediately upon the question being discussed here. It exists because in 1215 both English and Continental systems of criminal procedure were moving towards making the disqualification of women if not obsolete, at least of much less significance than it had been. This was an incidental consequence of a fundamental shift in procedural rules. In the church's jurisprudence, the ancient criminal *accusatio* was

²⁰⁵ Dig. 48.2.8.

²⁰⁶ C. 2 q. 1 c. 14: "[S]i suam iniuriam exequantur, mortemve propinquorum defendant, ab accusatione non excluduntur"; C. 15. q. 3 c. 1: disqualification of women "nisi suam vel suorum prosequatur iniuriam." For fuller discussion, with a bibliography of prior literature, see Giovanni Minnucci, *La dottrina dei primi glossatori canonisti intorno alla capacità processuale della donna*, in Maria Teresa Guerra Medici, ed, *Orientamenti civilistici e canonistici sulla condizione della donna* 99 (Edizioni Scientifiche Italiane 1996). The *ius commune* also made exceptions to allow women to bring *accusationes* in certain situations, as for example the crime of treason.

²⁰⁷ See Hudson, *The Formation of the English Common Law* at 235-36 (cited in note 26); C.A.F. Meekings, ed, *Crown Pleas of the Wiltshire Eyre, 1249 89-90* (16 Wiltshire Archaeological & Natural History Society, Records Branch 1961); Naomi D. Hurnard, *The King's Pardon for Homicide before A.D. 1307* 210 n 1 (Oxford 1969). Daniel Klerman has plausibly suggested that the wording of this chapter reflected practice, because only in criminal appeals of homicide were appellees imprisoned. Other appeals were dealt with by attachment; in other words the appellee had only to find pledges for his appearance. See Klerman, *Private Prosecution of Crime* at 102-27 (cited in note 169). The number of appeals brought by women in other situations was surprisingly high.

being pushed aside in favor of the *inquisitio*, in which more responsibility for the initiation and continuation of criminal prosecutions rested with the officials of the court. In English law, the jury of presentment and its well-known consequences were likewise coming to displace the ancient system of criminal appeals. In neither system was the old system actually discarded or abolished. The rules about the restricted rights of women continued in force in both systems. They simply became less important in practice.

Chapter 61

Cum autem pro Deo, et ad emendacionem regni nostri, et ad melius sopiendam discordiam inter nos et barones nostros ortam, hec omnia predicta concesserimus, volentes ea integra et firma stabilitate in perpetuum quadere, facimus et concedimus eis securitatem subscriptam; videlicet quod barones eligant viginti quinque barones de regno quos voluerint, qui debeant pro totis viribus suis observare, tenere, et facere observari pacem et libertates quas eis concessimus, et hac presenti carta nostra confirmavimus. . . . In omnibus autem que istis viginti quinque baronibus committuntur exequenda, si forte ipsi viginti quinque presentes fuerint, et inter se super re aliqua discordaverint, vel aliqui ex eis summoniti nolint vel nequeant interesse, ratum habeatur et firmum quod major pars eorum qui presentes fuerint providerit, vel preceperit, ac si omnes viginti quinque in hoc consensissent; et predicti viginti quinque jurent quod omnia antedicta fideliter observabunt, et pro toto posse suo facient observari. . . .

Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant to them the underwritten security, namely, that the barons choose five-and-twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter Further, in all matters, the execution of which is

entrusted to these twenty-five barons, if perchance these twenty-five are present and disagree about anything, or if some of them, after being summoned, are unwilling or unable to be present, that which the majority of those present ordain or command shall be held as fixed and established, exactly as if the whole twenty-five had concurred in this; and the said twenty-five shall swear that they will faithfully observe all that is afore-said, and cause it to be observed with all their might.

...

Chapter 61 is probably the most criticized of all the parts of Magna Carta. It served to legalize war against the king by decision of what has been described as a "Committee of Rebellion." A committee of twenty-five barons was to be elected, and, if in the opinion of this committee the king failed to set right any violation of the Charter, after being given appropriate notice, the barons "together with the community of the whole land" (*communa totius terre*) were given the right to "distrain and distress [the king] in all possible ways, namely by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained."²⁰⁸ The chapter set up careful mechanisms for appointment of the members of the Committee, for bringing complaints to it, for choice of its local agents, and for binding decisions to be made by a majority of those present.

McKechnie described chapter 61 as "crude" and also as "clumsy and impracticable."²⁰⁹ He was not alone in expressing this view.²¹⁰ Professor Holt, however, has shown how closely its provisions were aligned with the feudal laws of other medieval kingdoms;²¹¹ in his opinion the chapter does not altogether deserve the opprobrium it has received over the years.²¹² There is much to be said for his view. The critics of this means of enforcement have not been able to suggest what a workable alternative would have been. It is undeniable, however, that the chapter was dropped from reissues of the Charter. Like several of the chapters noted so far, its system of organized war against the monarch did not accord with the practical exigencies of government any more than it did with the dignity of the crown.

²⁰⁸ Holt, *Magna Carta* at 470-71 (cited in note 5).

²⁰⁹ McKechnie, *Magna Carta* at 472 (cited in note 25).

²¹⁰ See William Holdsworth, 2 *A History of English Law* 212-13 (Methuen 4th ed 1936).

²¹¹ Holt, *Magna Carta* at 78-79 (cited in note 5).

²¹² *Id* at 344.

It cannot be said that chapter 61 was inspired by the *ius commune* in its central feature—the legalization of rebellion. However, in one particular feature, it may have been. That is the provision for majority rule among the twenty-five barons of the Committee. The majority was to bind the minority. This principle was not a part of the English common law—witness the insistence upon unanimity for juries.²¹³ McKechnie therefore supposed that the barons must have “devised, or stumbled upon, a peculiarly modern expedient.”²¹⁴ Discovery by invention or accident is of course possible, but it seems more plausible to suppose that the idea was taken from the evolving law of the church.²¹⁵ Texts in the *Decretum* supported the assumption that, in the absence of special circumstances, the choice of the majority of electors should prevail in the choice of bishops (Dist. 63 c. 36). Pope Alexander III had established the rule of a two-thirds majority in papal elections (X 1.6.6), and the Fourth Lateran Council had endorsed the principle that canonical elections were to be consented to by “the greater and more discerning portion” (*maior et sanior pars*) of the community of electors (X 1.6.42).

This principle was a relatively new and a controversial one at the time, and not without its detractors in the church itself. But majority rule would carry the day in the canon law.²¹⁶ It would soon be presumed that the *maior pars* of the electors would also be the *sanior pars*. That was also the assumption of chapter 61. It may also be worth noting that the “community of the whole land” that was vital to the enforcement mechanisms of chapter 61 incorporated a concept of corporate entity that was much discussed in canonistic commentary of the time.²¹⁷ Unlike the “Committee of Rebellion” that was the principal feature of the chapter, this con-

²¹³ See Ludwig Riess, *The History of the English Electoral Law in the Middle Ages* 82-83 (Cambridge 1940, repr Octagon 1973) (K.L. Wood-Legh, trans).

²¹⁴ McKechnie, *Magna Carta* at 470 (cited in note 25).

²¹⁵ I am not the only person (or the first) to reach this conclusion. See S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* 134-35 (Cambridge 1936); George L. Haskins, *The Growth of English Representative Government* 32 (Pennsylvania 1948).

²¹⁶ See Ferdinand Elsener, *Zur Geschichte des Majoritätsprinzips (Pars maior und Pars sanior), insbesondere nach schweizerischen Quellen*, in *Studien zur Rezeption des gelehrten Rechts: Ausgewählte Aufsätze* 17-51 (Sigmaringen 1989) (Friedrich Ebel and Dietmar Willoweit, eds); Anscar Parson, *Canonical Elections: An Historical Synopsis and Commentary* 59-61 (Catholic 1939).

²¹⁷ “. . . communia totius terrae.” On the concept’s connection with the *ius commune*, see Tierney, 5 J L & Religion at 173-74 (cited in note 26) (suggesting a connection with the work of Richard de Mores, prior of Dunstable at the time). See also Carlo Rossetti, *The notion of “corporation” and the religious foundations of modern constitutionalism: a sociological-comparative view*, in Giorgio Piva and Frederico Spantigati, eds, *Nuovi moti per la formazione del diritto* 251 (Padova 1988).

cept and the principle of majority decisionmaking that accompanied it were to have glorious futures.

Further Chapters

The chapters so far discussed are probably the clearest examples of congruence between the rules of the *ius commune* and the provisions of Magna Carta. They do not exhaust the subject. Several other chapters also suggest the hand of a draftsman who knew something of the Roman and canon laws.

One attractive example concerns children. The Charter's provisions stating the obligations of the guardians of minors (chs 4 and 5) were closer to those found in the Roman law of *cura* and *tutela* than they were to the feudal wardship of the English common law. Wardship of infants who held land by military tenure was a source of profit under the common law.²¹⁸ The guardian was obliged only to provide a reasonable allowance for the maintenance and education of the child out of the revenues accruing to the ward. The guardian could pocket the rest. By contrast, the powers of the guardian in the civil law were closer to those of fiduciary. A guardian was a "protector and defender" of those placed in his charge (Inst. 1.13.2). He was required to preserve the real property of the minor and restore it at the end of the guardianship (Dig. 27.9.1).²¹⁹ So also held the canon law (C. 12 q. 1 c. 1). Vacarius himself had added glosses to that effect in the *Liber pauperum*.²²⁰ The Great Charter required guardians to meet a similar standard of conduct. They were to keep up (*sustinere*) the ward's lands and appurtenances and to restore them to the heir when he had reached the age of majority. The fit was not exact in every detail. The guardian was still described as *custos*: there was no move to adopt the civil law terms of *tutor* or *curator*. The substance of the duties imposed upon English *custos* and civilian *tutor*, however, was largely identical.

A second example can be taken from chapter 33, which required removal of obstructions to navigation in the Thames, the Medway, and "throughout all England." The chapter recited that "kydells," or fish-weirs, had been set up the rivers; they were to be removed. Although the text itself named only fish-weirs as of-

²¹⁸ Pollock and Maitland, 1 *History of English Law* at 318-29 (cited in note 28).

²¹⁹ See generally Gigliola Villata di Renzo, *La tutela. Indagini sulla scuola dei glossatori* 271-303 (Mori 1975).

²²⁰ See F. de Zulueta, ed, *The Liber pauperum of Vacarius* 185 (44 Selden Society 1927). See also Baldwin, 1 *Masters, Princes and Merchants* at 248-49 (cited in note 183) (drawing a comparison between the Charter's provisions and the *Summa* of Robert of Courson).

fending obstacles, in then current parlance the term encompassed all fixed contrivances that inhibited navigation.²²¹ What was intended was to secure free movement on the rivers, not to inhibit fishing. At the very least, this purpose was consistent with the *ius commune*. The Praetor's edict forbade "doing anything in a public river . . . by which the landing or passage of a boat is impeded" (Dig. 43.12.1). The Institutes stated definitively that "all rivers are public" (Inst. 2.1.2),²²² and under Roman law a legal action could be brought to compel removal of obstacles standing in the way of "the convenience of navigation."²²³ Again, the glosses of Vacarius had called attention to these provisions.²²⁴ It is difficult to see what natural interests the barons (or the clergy for that matter) would have had in freedom of navigation, and if we remember the enormous value ascribed to Roman law during these years, the inclusion of chapter 33 becomes easier to comprehend.

It is also possible that the famous chapter 39 owed something to the influence of the canon law. The chapter promised that the king would neither imprison, disseise, nor otherwise "go against" a free man without a lawful judgment. Much of the modern discussion of this chapter has concerned the precise meaning of the apparently alternative paths being provided—"by the judgment of his peers or by the law of the land." Of equal or greater importance at the time, however, would have been the Charter's creation of a requirement that there be a judgment of any kind before the king could act.²²⁵ Only when that basic requirement has been accepted does it become important to know exactly how the mechanism will work, and contemporary events showed that there was a real need for stating the principle clearly.

²²¹ McKechnie, *Magna Carta* at 343-44 (cited in note 25).

²²² See also Dig. 1.8.5 and Dig. 43.14.1.

²²³ *Gl. ord. ad Dig. 43.11.1 s.v. Deinde ait Praetor*: "Secundo dicit primum edictum est prohibitorium, secundum restitutorium et ad idem spectans, scilicet ad commoditatem navigandi." See also the following useful treatments on aspects of the subject: Alain Wijffels, *La liberté de navigation sur l'escaut à l'avènement de Charles le téméraire*, in H. Van Goethem, L. Waelkens, and K. Breugelmans, eds, *Libertés, pluralisme et droit. Une approche historique* 123-32, esp n 21 and accompanying text (Bruylant 1995); Philippe Godding, *Flumen liberum. Un avis de légistes liégeois (1424) à propos de la navigation sur la Gette*, in Jean-Marie Cauchies and Serge Dauchy, eds, *Commerce et droit. Actes des Journées de la Société d'histoire du Droit et des Institutions des pays flamands, picards et wallons tenues à Ath du 25 au 28 mai 1995* 101, esp 110-11 (Facultés Universitaires Saint-Louis 1996).

²²⁴ See de Zulueta, ed, *The Liber pauperum* at cxlvii, 249 (cited in note 220).

²²⁵ See Joseph Biancalana, *For Want of Justice: Legal Reforms of Henry II*, 88 Colum L Rev 433, 473-81 (1988); Powicke, *Per Iudicium Parium* at 103 (cited in note 14); C.H. McIlwain, *Due Process of Law in Magna Carta*, in *Constitutionalism and the Changing World* 86, esp 90, 106 (Cambridge 1939).

The necessity for a valid judgment before any punitive action could be taken against any individual turns out to have been a theme of the canon law,²²⁶ and a particularly important one in the climate of the times. It had been the custom of churchmen, even some very saintly churchmen, to excommunicate on the spot men or women they deemed to be public sinners. The canon law had set its face against such hastily considered anathemas, though the change was recent in 1200. With few exceptions, the emerging canon law was coming to hold that excommunication required that there be a hearing and a formal sentence before it could be issued.²²⁷ This parallel with chapter 39, coupled with the coincidence that in 1213 Archbishop Stephen Langton had insisted that King John could take no action against the northern barons without a legal judgment, has suggested to Professor John W. Baldwin that the form taken by this chapter may have owed something to the learned laws.²²⁸ Support for the rule could also have been found in some secular precedents—again testimony to the way secular and spiritual were commonly mixed in the thirteenth century—but Baldwin's suggested connection with the learned laws is plausible at the very least.

Parts of chapter 55 seem also to have been drawn from the *ius commune*. The chapter provided a mechanism for remitting unjust fines that had been levied by the king or his ministers. Henceforth judgments about whether relief should be granted in individual cases were to be made by a group of twenty-five barons, together with the archbishop of Canterbury and other bishops he might name, although the chapter specified that if the archbishop could not be present the matter was to proceed without him. The chapter also provided that barons who had similar quarrels were to be removed from the panel and others substituted in their place. These rules follow very closely the usages attached to the appointment and service of papal judges delegate in the canon law. In the church's emerging law, similar provisions for subdelegation and judicial absence were almost always made (for example, C. 2 q. 5 c. 17; X 1.29.3).²²⁹ The same routine dis-

²²⁶ James A. Brundage, *Proof in canonical criminal law*, 11 *Continuity & Change* 329 (1996).

²²⁷ For example, X 2.28.26 (= Lateran III, ch 6). Evidence on this issue is presented in my *Excommunication in Twelfth Century England*, 11 *J L & Religion* 235 (1994-95).

²²⁸ Baldwin, 1 *Masters, Princes and Merchants* at 169-70 (cited in note 183). See also Kelley, *The Human Measure* at 173 (cited in note 20). For parallels with other European systems, see Thomas Ollinger, *Die Entwicklung des Richtervorbehalts im Verhaftungsrecht von den Anfängen bis zur Paulskirchenverfassung* 112-25 (Dunckor & Humblot 1997).

²²⁹ See Sayers, *Papal Judges Delegate* at 135-43 (cited in note 27).

qualification of judges who had been involved in similar causes (*similis paene causa*) was also part of the canon law (X 2.1.18).²³⁰ They were unknown, however, in contemporary courts of the English common law. It is much easier to understand why chapter 55 took the shape it did if one supposes the existence of influence from the contemporary canon law.

These parallels with the *ius commune* could be continued. Restriction on services due to the crown (ch 16) may plausibly be connected with the limitation to *rationabilia servicia* found in the law of the church.²³¹ Chapter 18's provision requiring that the possessory assizes be held in the court of the county where the property was situated might be tied to the principle found in the canon law that offenses should be punished in the location where they occurred (X 3.38.29; X 3.49.10).²³² An argument can be made—indeed one has been made—that the important phrase “iudicium parium suorum” used in chapters 39 and 52 was taken originally from the *Libri feodorum* and introduced into England after being employed with approval in papal letters sent to the king and the barons.²³³ The careful separation of the clerical and lay orders found in chapter 60 and the inclusion of a “savings clause” in it that restricted the law's reach to those things “which pertained to” each order were entirely characteristic of the approach of the medieval canon law (C. 12 q. 1 c. 7). Like several of the chapters discussed at greater length above, none of these provisions can be said simply or fully to have enacted the canon or Roman laws. However, they do accord with what is found in the other chapters: a congruence between the aims and assumptions of the chapters and the provisions and purposes of the *ius commune*. A pattern emerges.

²³⁰ (= 4 Comp. 2.1.1).

²³¹ This seems to have been the understanding of William Lyndwood, *Provinciale (seu Constitutiones Angliae)* 259 s.v. *rationabilia servitia* (Oxford 1679).

²³² (= 3 Comp. 3.30.4).

²³³ The argument is that the phrase was contained in a letter to England from Innocent III, who may have known of its existence from the *Libri feodorum*. Barnaby C. Keeney, *Judgment by Peers* 56 (Harvard 1949). Keeney rejects it as “unnecessary,” however, since the general idea was widely known in England, and indeed in feudal Europe more generally, long before 1215. His argument seems entirely correct to me, except that I would not agree that one must make a choice. I would say that this was one of the ideas, found stated in the learned laws, that had become common coin by this time. The argument is also taken seriously and discussed in Reynolds, *Fiefs and Vassals* at 228, 384-85, 390 (cited in note 49); and also (surprisingly) in William Stubbs, 1 *The Constitutional History of England* 537 n 6 (Oxford 3d ed 1880).

III. OTHER EVIDENCE

The existence of so many parallels between the *ius commune* and Magna Carta's chapters at the very least raises the possibility of influence. But is it really likely? There is no "smoking gun" to prove it, and not all the parallels show the distinct footprints of emulation. They simply prove that a similar path was being trod.

We know too little about the circumstances of the Charter's drafting, it should be said, to hope for the discovery of entirely conclusive evidence one way or the other on this basic question. That kind of conclusive evidence does not exist for any of the Charter's sources, even for those that appear clearly to have been drawn from purely English sources. The drafters left no notes. The Charter contains not a word to prove that they had looked at even so fundamental a document as Henry I's Coronation Charter, although it seems self-evident that they did.²³⁴ On this account we must not place our expectations too high. It is nonetheless legitimate, possible, and fruitful to ask whether there is supplementary evidence that sheds any light on the question. In fact, there is a little, and by and large it supports the argument that some chapters of the Charter were very likely influenced by the *ius commune*.

A. Knowledge of the *ius commune* Among the Drafters

In light of later history of the common law, it is not easy to recapture the enormous prestige of Roman law in England during this era.²³⁵ It is even harder to appreciate the contemporary scope and importance of the nascent law of the church. However, both are beyond doubt. Some familiarity with the canon and Roman laws would have been shared by many royal officials. At least during these early years of the history of English common law, acquiring some knowledge of the *ius commune* was a part of the training of many lawyers who served in the royal courts. Something like half of the royal justices, for example, were themselves ecclesiastics.²³⁶ Many, though not all, of these men would have had experience with the main features of the *ius commune*,

²³⁴ For example, Alan Harding, *Political Liberty in the Middle Ages*, 55 *Speculum* 423, 430 (1980) ("Magna Carta itself can be viewed as an enormously extended version of Henry I's charter.").

²³⁵ Richardson and Sayles, *The Governance of Mediaeval England* at 372 (cited in note 18) ("But the influence of Roman law, both as an academic discipline and as an authority to be applied in determining legal issues, is all pervading. Moreover, the debt of canon law to Roman law was direct and immense.").

²³⁶ See Ralph V. Turner, *The English Judiciary in the age of Glanvill and Bracton, c. 1176-1239* 88-90 (Cambridge 1985).

gained either in the schools or in their work in the world.²³⁷ We know that such knowledge, diffused among English lawyers, had an impact on the common law in other areas; unless we make the heroic assumption that lawyers had no hand whatsoever in drafting of Magna Carta, it makes sense to suppose that something like the same thing would have occurred in this instance.

If this seems too much like an argument that the *ius commune* was "in the air," and if actual drafters with a knowledge of the law are required on that account, there is a good candidate at hand. Historians have long recognized that a leading role in the formulation of the Great Charter was played by the archbishop of Canterbury, Stephen Langton.²³⁸ The contemporary chronicler, Ralph of Coggeshall, went so far as to ascribe the "quasi-peace" of the Charter's settlement to the archbishop, whom he described as acting "with several of his fellow bishops and barons."²³⁹ When one speaks of "the barons" behind the Charter, it should be remembered that the greater prelates are included in the class.

Langton and the clergy in his service had both the opportunity and the knowledge to have suggested some of the provisions found in the final product produced at Runnymede. It is true that Archbishop Langton himself was primarily a theologian. He was "eminent in the barren learning of contemporary theology," as one of his modern detractors has put it,²⁴⁰ having been a master of biblical studies and a teacher in the University of Paris before he came to the see of Canterbury.²⁴¹ This theological orientation might seem to render unlikely any real knowledge of the *ius commune* on Langton's part, or at least any desire to push for its extension into temporal law. However, it would be anachronistic to separate the two disciplines of law and theology during this period, and the common assumption was that there should be a

²³⁷ See *id.* at 36-39, 97.

²³⁸ The extent and exact nature of that influence has been a subject of doubt, however, even if its existence has been admitted on all sides. One early twentieth century observer described him as "the prince of all draftsmen" for his work on the Charter. Henry T. Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* 2 (Little, Brown 1902). The question is dealt with in magisterial fashion in Holt, *Magna Carta* at 268-71, 280-87 (cited in note 5).

²³⁹ Josephus Stevenson, ed, *Radulphi de Coggeshall Chronicon Anglicanum de expugnatione terrae sanctae libellus* 172 (66 Rolls Series 1875, repr Kraus 1965) ("Intervenientibus itaque archiepiscopo Cantuariensi cum pluribus coepiscopis et baronibus nonnullis, quasi pax inter regem et barones formata est.").

²⁴⁰ Richardson and Sayles, *The Governance of Mediaeval England* at 337 (cited in note 18).

²⁴¹ See F.M. Powicke, *Stephen Langton* 23-74 (Oxford 1928). See also the more recent treatment, Turner, *King John* at 230 (cited in note 26). There are dissenting voices; see Richardson and Sayles, *The Governance of Mediaeval England* at 337-63 (cited in note 18).

positive relation between temporal and spiritual laws. There was no Chinese wall between any of the legal systems, at least in the eyes of most churchmen. Moreover, Langton himself could not have been wholly unfamiliar with the work of the canonists, since he quoted opinions of the *decretistae* in his unpublished *Quaestiones*, a manuscript that is now in the library of St. John's College, Cambridge.²⁴²

Even if one were to dismiss Langton's personal knowledge of the *ius commune* as insufficient to have played any significant role in his contribution to drafting the Charter, it is nonetheless true that among his episcopal *familia* stood men learned in the Roman and canon laws. William of Bardney and Adam of Tilney were the most prominent.²⁴³ There were unquestionably others; the documents prepared in Langton's chancery commonly referred to the presence there of *iuris periti*.²⁴⁴ Perhaps Eustace, bishop of Ely and a frequent papal judge delegate who was said to have taken a significant part in negotiations before his death in 1215, played this role.²⁴⁵ We can only guess. On the general question, however, there is much less doubt. Knowledge and access to the *ius commune* were available to the influential drafters of the chapters of Magna Carta. It is sensible to think that they made use of what they knew.²⁴⁶

B. The Attitude of the Church

King John quickly appealed to Pope Innocent III after the events at Runnymede, asking to be freed from its obligations. The Pope almost immediately declared Magna Carta invalid.²⁴⁷ It might be objected that this action by the Pope counts against the

²⁴² St. John's College, Cambridge, MS. 57, f. 171: ". . . et ita cum decretiste intelligent de peccatis etiam diversorum generum." See also the evidence presented in Baldwin, 1 *Masters, Princes and Merchants* at 25-31 (cited in note 183).

²⁴³ F.M. Powicke, *The 'Familia' of Archbishop Stephen Langton*, 48 *English Hist Rev* 529, 529-30 (1933). The pattern was normal, perhaps even imperative at the time. See Charles E. Lewis, *Canonists and Law Clerks in the Household of Archbishop Hubert Walter*, in Richard H. Bowers, ed, *Seven Studies in Medieval English History and Other Historical Essays Presented to Harold S. Snellgrove* 57 (Mississippi 1983); M. Brett, *The English Church under Henry I* 183-84 (Oxford 1975).

²⁴⁴ See Kathleen Major, ed, *Acta Stephani Langton, Cantuariensis archiepiscopi A.D. 1207-1228* 13, 83 (50 Canterbury and York Society 1950).

²⁴⁵ See Holt, *Magna Carta* at 283 (cited in note 5).

²⁴⁶ Professor Holt's view seems to be the contrary, however; see *Magna Carta and the Origins of Statute Law* at 302 (cited in note 2) ("In so far as churchmen influenced the changing content of the Charter it was not as canonists but as secular administrators experienced in royal government.").

²⁴⁷ The text is found in Cheney and Semple, eds, *Selected Letters of Pope Innocent III* at 212-16, No 82 (1215) (cited in note 52).

possibility of canonical influence on the Charter. Its invalidation by the highest judicial authority in the canon law seems to set the interests of the church against the contents of the Charter.

Fully considered, however, the objection largely disappears. The reasons the pontiff gave for annulling the Charter were not the model of lawyerly clarity,²⁴⁸ but they made no mention whatsoever of basic opposition between the law of the church and the provisions contained in Magna Carta.²⁴⁹ Some of its provisions were described in the papal letter annulling the Charter as standing in derogation and diminution of the king's right and honor, or as impeding the fulfillment of the king's crusading vow, or as having been extorted from him "by force and fear sufficient to move a most constant man," or as being generally iniquitous, vile, and shameful.²⁵⁰ There is nothing in the pope's letter, however, suggesting that violations of the church's substantive law were to be found in the various chapters of Magna Carta. The absence of this particular objection is surely conspicuous. Invasion of the church's liberties and infringement upon the principles contained in its laws would have been the easiest charges to have made in annulling the Charter, had they been plausible. Such charges amounted almost to a "theme" of the papal chancery at the time. But, to all appearances, they did not seem appropriate here.

Insofar as one voice can be said to have emanated from a large and fractious clerical order, the attitude of the church actually counts in favor of the argument being advanced here. Once the Charter had been revised and reissued, it produced no further papal or ecclesiastical objection. In fact, it produced the reverse. Archbishop Langton solemnly excommunicated anyone who infringed the Charter's provisions,²⁵¹ and the precedent was many times repeated, notably in connection with the *Confirmatio Cartarum* of 1297.²⁵² In 1254, Pope Innocent IV himself confirmed the

²⁴⁸ On the weakness of the evidence that Innocent III was a lawyer, see Kenneth Pennington, *The Legal Education of Pope Innocent III*, 4 Bull Medieval Canon L (new series) 70 (1974).

²⁴⁹ That the legal reasons for annulment were not feudal in character is shown in G.B. Adams, *Innocent III and the Charter*, in Malden, ed, *Magna Carta Commemoration Essays* 26-40 (cited in note 14).

²⁵⁰ Cheney and Semple, eds, *Selected Letters of Pope Innocent III* at 212-19, Nos 82-83 (1215) (cited in note 52).

²⁵¹ Powicke and Cheney, eds, 1 *Councils & Synods* at 138 n 1 (cited in note 88) (offering chronicle evidence).

²⁵² J.C. Holt, *The Ancient Constitution in Medieval England*, in Sandoz, ed, *The Roots of Liberty* 22, 28-29 (cited in note 13). See also Cheney, 68 *Theology* at 272 (cited in note 18); Gray, 6 *Hist Stud* at 32-35 (cited in note 18); Thompson, *The First Century* at 99 (cited in note 18).

sentence of excommunication against those who infringed its terms,²⁵³ and the English clergy themselves invoked these sentences against violators of the Charter's provisions.²⁵⁴

It is noteworthy that in 1279 Archbishop Pecham ordered the Charter's text posted in a public place within every English cathedral and collegiate church, "so that it could be clearly seen by the eyes of everyone entering."²⁵⁵ The text was also included in the *Pars oculi*, a manual for English parochial clergy compiled by William of Pagula in the early fourteenth century.²⁵⁶ William Lyndwood's *Provinciale*, the outstanding work of English canon law that was written in the mid-fifteenth century, also included a denunciation of those who infringed its provisions.²⁵⁷ By such inclusions, the English church identified its own interests with the revised Magna Carta. Doubtless the explanation for this identification lies in some part in the Charter's first chapter guaranteeing the liberty of the church. All the same, it does not seem wholly idle to think that one reason for the identification may have been the congruence between many of its chapters and the *ius commune*. At the very least, such evidence shows that one cannot suppose an antipathy between them.

C. A European Perspective

In evaluating the argument of this Article and in seeking better to understand the Charter, it is also helpful to put the evidence into a European perspective. The thirteenth century was a great age for grants of fundamental liberties and for statements of fundamental laws. The English Magna Carta was by no means a unique document.²⁵⁸ One thinks easily of other examples: the Hungarian Golden Bull of 1222,²⁵⁹ or Frederick II's Constitutions of Melfi of 1231.²⁶⁰ The French *Établissements de Saint Louis*, the

²⁵³ *Annales de Burton*, s. d. 1254, in 1 *Annales Monastici* 318-20 (36:1 Rolls Series 1864) (H.R. Luard, ed).

²⁵⁴ See Robert C. Stacey, *Politics, Policy, and Finance under Henry III, 1216-1245* 138 (Oxford 1987).

²⁵⁵ Powicke and Cheney, eds, 2 *Councils & Synods* part 1 at 851 (cited in note 88).

²⁵⁶ Leonard E. Boyle, *The Oculus Sacerdotis and some other Works of William of Pagula*, 5 *Transactions of the Royal Hist Soc* 81, 87 (5th series 1955).

²⁵⁷ Lyndwood, *Provinciale* at 354 (cited in note 231).

²⁵⁸ Holt, *Magna Carta* at 25-29 (cited in note 5); Plucknett, *A Concise History of the Common Law* at 25 (cited in note 26).

²⁵⁹ See Elemér Hantos, *The Magna Carta of the English and of the Hungarian Constitution: A Comparative View of the Law and Institutions of the Early Middle Ages* xxv, 21-36 (Trübner 1904). The text of the Hungarian *Bulla Aurea* is given in id at 185-99.

²⁶⁰ There is an English translation of the Constitutions in James M. Powell, ed and trans, *The Liber Augustalis or Constitutions of Melfi Promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231* (Syracuse 1971). For its debt to the *ius commune*,

Spanish *Fuero real*, and the *Siete Partidas* of King Alfonso X from closer to the middle of the century stand in the same tradition.²⁶¹ And this is not to speak of many of the most fundamental legal works of the time, such as Beaumanoir's *Coutumes de Beauvaisis*, the German *Sachsenspiegel*, or the Scottish *Regiam Majestatem*.²⁶²

Would the sources of any of these basic legal works today be discussed without recognizing the role that the Roman and canon laws played in their formulation? For anyone familiar with recent scholarship about them, the question answers itself. The important place of the *ius commune* in the formulation of all these texts is well established.²⁶³ It is a scholarly commonplace. Even the laws of King Magnus VI of Norway (d. 1280), written far from Bologna and Rome, were touched by the *ius commune*.²⁶⁴ Early statements of basic laws in European lands were rarely developed in separate geographic compartments, free from contamination from without.

Is it likely that Magna Carta stands by itself? Is it sensible to assume that Magna Carta, virtually alone of all such European documents granting rights and stating fundamental legal rules, was untouched by the influence of the Roman and canon laws? It is possible, no doubt. But many of the chapters in Magna Carta

see Thea Buyken, *Das römische Recht in den Constitutionem von Melfi* (Westdeutscher verlag 1960); Heinz Hübner, *Friedrich II. von Hohenstaufen und das Recht*, in *Rechtsdogmatik und Rechtsgeschichte. Ausgewählte Schriften* (Heymanns 1997).

²⁶¹ See Jean Gaudemet, *L'influence des droits savants (romain et canonique) sur les textes de droit coutumier en occident avant le XVIe s.*, in 1 *La Norma en el derecho canónico. Actas del III Congreso internacional de derecho canónico*, Pamplona, 10-15 de octubre de 1976 165 (Ediciones Universidad de Navarra 1979); André Gouron, *Ordonnances des rois de France et droits savants (XIIIe-XVe siècles)*, in *Académie des Inscriptions & Belles-lettres: Comptes rendus des séances de l'année 851-65* (Paris Nov-Dec 1991); Raimundo Bidagor, *El derecho de las Decretales y las Partidas de Alfonso el Sabio de España*, in 3 *Acta Congressus iuridici internationalis, VII saeculo a Decretalibus Gregorii IX et XIV a Codice Iustiniano promulgatis* 297-313, esp 300 (Pontificum Institutum Utriusque Iuris 1936); José Gimenez and M. de Carvajal, *El decreto y las decretales fuentes de la primera partida de Alfonso el Sabio*, in *Anthologica annua: Publicaciones del Instituto Español de Estudios Eclesiásticos* 239-348 (Iglesia Nacional Española 1954); Gérard Giordanengo, *Consuetudo constituta a domino rege: coutumes rédigées et législation féodale France: XIIIe-XIIIe S.*, in *El Dret comú i Catalunya* 51 (11 Fundació Noguera, Estudis 1996).

²⁶² H.G. Richardson, *Roman Law in the Regiam Majestatem*, 67 *Juridical Rev* 155 (1955).

²⁶³ See Manlio Bellomo, *The Common Legal Past of Europe 1000-1800* 78-111 (Catholic 1995) (Lydia G. Cochrane, trans); O.F. Robinson, T.D. Fergus, and W.M. Gordon, *An Introduction to European Legal History* 318-21 (Professional Books 1985).

²⁶⁴ See Francesco Calasso, *Medio Evo del diritto: vol. 1—Le Fonti* 620 (Dott. A. Guiffre 1954); Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* 321-23 (Almqvist & Wiksell 1960); Dieter Strauch, *Zur Rechtsfortbildung im mittelalterlichen Schweden*, in Gerhard Köbler, ed, *Wege europäischer Rechtsgeschichte: Karl Kroeschell zum 60. Geburtstag dargelegt von Freunden, Schülern und Kollegen* 504 (Verlag Peter Lang 1987).

look very similar to those found in its European counterparts.²⁶⁵ For instance, the Spanish *Siete Partidas* contains a provision that guaranteed widows a certain freedom in deciding whether or not to remarry.²⁶⁶ Its intended effect was very like that of Magna Carta's chapter 8, though its wording was not identical. Few historians question the Spanish text's connection with the canon law, even though its language was not copied from the Decretals and even though it did not refer expressly to any enactment by the church. The stretch required to make the same connection for the English Charter is no greater.

There is one other factor worth considering. These were early days in the development of the English common law. No sturdy, long-established tradition of English exceptionalism existed in 1215. England was a European land. Some of the barons held lands on both sides of the Channel. There was movement back and forth. These connections had consequences.²⁶⁷ The examples of *Glanvill* and *Bracton* show how common it then was in England to make use of ideas taken from Roman and canon law.²⁶⁸ The common usage among the European legal systems, taking much in principle and detail from the Roman and canon laws, was not unfamiliar in twelfth and thirteenth century England. On this score, the negative finding that some of the ideas in Magna Carta were not to be found in earlier English sources must be significant. Where did these ideas come from? It is possible, of course, that all of them were baronial inventions. However, to suppose Magna Carta conformed to a pattern found in similar documents of the same era from the Continent does not call for a leap in the dark.

This supposition should not of course cause us to overlook the presence of differences between the English common law and the Roman and canon laws. There is no doubt that disharmony and sometimes outright opposition between them did exist. However, similar disharmony and opposition existed in other European

²⁶⁵ See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 293-94, 307-09, 342-44 (Harvard 1983).

²⁶⁶ See *Las Siete Partidas del sabio rey don Alonso el nono, nuevamente glosadas por el licenciado Gregorio López* pt 4, tit 12, ch 3, p 39 (Andrea de Portonaris 1555, repr Boletín Oficial del Estado 1974). See generally Marilyn Stone, *Marriage and Friendship in Medieval Spain: Social Relations According to the Fourth Partida of Alfonso X* 58-59 (Peter Lang 1990).

²⁶⁷ See R.W. Southern, *The place of England in the Twelfth Century Renaissance*, in Southern, *Medieval Humanism and Other Studies* 158 (cited in note 33).

²⁶⁸ See G.D.G. Hall's Introduction to *Glanvill*, in Hall, ed and trans, *Tractatus de legibus et consuetudinibus* at xxxvi-xl (cited in note 137). It should be said, however, that Mr. Hall took a narrower view of the likely scope of civilian influence on English law than does this Article.

lands between their own customary law and the *ius commune*. This did not prevent the study and incorporation of parts of the Roman and canon laws into the local systems.²⁶⁹ Even in Italy, birthplace of the *ius commune*, lawyers were selective in their use of Roman law.²⁷⁰ They did not follow it slavishly.

It is worth noting—if only as an instructive parallel—that it was in exactly such circumstances that the canon law itself borrowed from the Roman law.²⁷¹ No one doubts the reality of this borrowing, even though there were profound differences and even conflicts between the two laws. The respective authority of imperial and papal power and the law of marriage and divorce provide two obvious examples in which Roman and canon laws took incompatible positions. Yet this did not prevent the newer canon law from taking over much from the older Roman law. The canonists used those parts of the Roman law they regarded as compatible with the needs and demands of a Christian law, discarding or ignoring those parts that were not. The *ius commune* came into existence in the process. Such selective borrowing has often occurred in the face of significant differences in legal culture.²⁷²

D. The Question of Motivation

An entirely natural impulse impels historians to ask why the drafters of Magna Carta might have wished to incorporate the *ius commune* into its provisions. The absence of any actual evidence on the point cannot altogether suppress the desire to seek out a plausible motive. Had there been no such motive, supposing that the drafters purposefully incorporated the *ius commune* into the Charter becomes distinctly less likely and attractive. It is worth raising this question briefly, if only to show that there are several plausible reasons contemporaries might have looked to the learned laws in formulating the Charter's provisions.

²⁶⁹ See, for example, Antonio García y García, *Derecho Comun en España: Los juristas y sus obras* 100-03 (Universidad de Murcia 1991).

²⁷⁰ See Peter Riesenbergh, *Roman Law, Renunciations, and Business in the Twelfth and Thirteenth Centuries*, in John H. Mundy, Richard W. Emery, and Benjamin N. Nelson, eds, *Essays in Medieval Life and Thought Presented in Honor of Austin Patterson Evans* 207, 222 (Columbia 1955, repr Biblo and Tannen 1965); Helmut Coing, *The Roman Law as ius commune on the Continent*, 89 L Q Rev 505, 512-14 (1973).

²⁷¹ See Albert Gauthier, *Roman Law and its Contribution to the Development of Canon Law* 3-12 (St. Paul 1996); Hermann Lange, *Römisches Recht im Mittelalter: Band 1, Die Glossatoren* 385 (C.H. Beck 1997).

²⁷² For a later example, see Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 Hastings L J 913, 967 (1997) ("The new culture ironically was based on a procedural device that was linked to institutions they despised (Rome, the Pope, ecclesiastical courts, the king).").

The first—perhaps the most immediately plausible if the least satisfying emotionally—is lawyerly habit. It has long been the custom of lawyers to copy ideas from other legal systems.²⁷³ This was so in 1215. It still is today. Nothing requires lawyers to do this. Indeed conditions of time, place, and social circumstance may militate against taking the step. But they take it all the same. Not wholly without reason, it should be said. If a legal rule has been used within other legal systems, it may be a better bet for success than an idea that is wholly new. At any rate, that is what happens, and given the enormous prestige of the *ius commune* in the years around 1200—not to speak of its relative size and sophistication—there would have been a natural incentive to look to rules from that system in an effort to restore order and justice in a troubled land.

A second possibility, more speculative to be sure, comes from recognizing that the barons were seeking to claim the moral high ground in their quarrel with their king. Use of the resources of the canon law might easily have helped to make their claim credible.²⁷⁴ A chronicler described the barons on the eve of the struggle for Magna Carta as having pledged themselves “to sustain the house of the Lord and stand fast for the liberty of the church and the realm.”²⁷⁵ What could have been more natural, more expedient, for men who saw themselves in that role than to have wished to associate themselves with God’s cause by borrowing a page from the law of the church?

A third possibility, more speculative still but not unbelievable, is that some of the drafters of the Charter, probably the bishops more so than the laymen, desired actively to advance the fortunes of the *ius commune* in England and saw this as an opportunity to promote that goal.²⁷⁶ Some men believed that the law of the Romans was more rational and desirable than an inherited regime of local custom. This was a common opinion on the Continent, as it was in England. Such men, reformers one might call them with only a touch of anachronism, sought to introduce the learned laws into practice where they could. For them, the events leading up to Magna Carta would have represented an opportunity. Particularly where no firmly established custom existed, which was the situation repeated in many of the areas covered by

²⁷³ See generally Alan Watson, *Failures of the Legal Imagination* (Pennsylvania 1988).

²⁷⁴ I owe this point to Sir James Holt.

²⁷⁵ William Stubbs, ed, *Memoriale fratris Walteri de Coventria* 218 (58:2 Rolls Series 1872-73) (“quod isti opponerant se murum pro domo Domini, et starent pro libertate ecclesiae et regni”).

²⁷⁶ I owe this suggestion to Professor Frances Foster.

the Charter's provisions, the temptation to make use of Roman and canon law would have been strong and natural to them.

E. Words and Substance

At various points in this survey, the Charter's use of civilian terminology has been noted and used to suggest the likelihood of influence from without. For example, the terms *delictum*, *testes*, and *vendere iusticiam* fit the world of the *ius commune* better than they did the common law in 1215. Their inclusion in the chapters suggests a drafter who felt himself at home with Continental law. However, such instances were by no means the rule in Magna Carta. For the most part, the borrowing (if there was borrowing) was of the substance of the *ius commune* rather than its vocabulary. The question must be, therefore, whether the absence of verbal borrowing presents an obstacle to supposing that any influence occurred. As Professor Raoul van Caenegem has remarked, this is a good question, and one "that has hardly been studied."²⁷⁷

As an initial matter, it appears that the Charter's merely occasional use of language drawn from the civil and canon laws does present such an obstacle. If one begins with *Bracton*, taking it as the model for influence from without, certainly this is so. The text of *Bracton*, as Maitland showed long ago, contains many passages lifted verbatim from civilian sources.²⁷⁸ The author borrowed words, not just ideas. It may be said that more is understood today about *Bracton's* knowledge of the *ius commune*; the author chose more wisely and selectively among his sources than Maitland had thought.²⁷⁹ We know, moreover, that simply using words drawn from the civil law does not in itself guarantee that the law being described would be identical to the Roman law. Sometimes the same word—*dos* for example—means something quite different in a changed setting. But still, the differences between the extent of *Bracton's* use of civilian terminology and the relative absence of such use in Magna Carta remains an apparent obstacle to accepting the existence of influence.

Reflection on other areas of comparison between the English common law and the *ius commune* suggests, however, that the

²⁷⁷ van Caenegem, *An Historical Introduction to Private Law* at 181 (cited in note 26).

²⁷⁸ See generally *Select Passages from the Works of Bracton and Azo* (cited in note 124).

²⁷⁹ See, for example, Hermann Kantorowicz, *Bractonian Problems* 58-78 (Jackson 1941); H.G. Richardson, *Bracton: The Problem of his Text* (2 Selden Society Supp Series 1965); Samuel E. Thorne, Introduction to 3 *Bracton on the Laws and Customs of England* (Harvard 1977) (George Woodbine, ed); J.L. Barton, *The Mystery of Bracton* 14:3 J Legal Hist 1 (1993).

pattern found in *Bracton* has not been invariable. In many situations, no identity in terminology has existed, even though there has been a clear connection between the two.²⁸⁰ The main English possessory remedy was called novel disseisin, for example, not *actio spoli* or some other term taken from a civilian source. Despite this, it has been widely accepted that the English remedy was shaped in some measure by Continental influences.²⁸¹ The English law of treason was touched by the Roman law's concept of *maiestas*, but English lawyers did not discard the term "treason" in favor of something that sounded more Roman.²⁸² There seems equally little doubt that "hotchpot" of the law of wills was taken over from the civilian *collatio bonorum*, but the Latin term was not taken up in English practice.²⁸³

It was by no means uncommon for equivalent institutions to be known by different names in England than were used in the *ius commune*. The English called the right to present a parson to a church an advowson (*advocatio* in Latin), not the canonical *ius patronatus*. Despite this, they amounted to the same right. English lawyers spoke of a writ of annuity; the canonists of a *causa annuae pensionis*. Despite this, the two were the opposite sides of the same coin. Sir William Jones, the great eighteenth century writer on the law of bailments, was later to state that "perfect harmony subsists" between Roman and English law on the "interesting branch of jurisprudence" that was his subject.²⁸⁴ However, that "harmony" did not require the English to discard the inherited French term "bailment" in favor of civilian terminology. There have been many such instances where English lawyers used "the thing if not the word" from the *ius commune*, as Professor Samuel Thorne once put it.²⁸⁵ The opposite has also been true.

²⁸⁰ This is in fact a theme of John Cowell, *Institutiones juris Anglicani ad methodum et seriem Institutionum imperialium compositae et digestae* 13-19 (Cambridge 1630).

²⁸¹ See note 35 and accompanying text; David J. Ibbetson, *Words and Deeds: The Action of Covenant in the Reign of Edward I*, 4 L & Hist Rev 71, esp 83-84 (1986) (arguing that adoption of the requirement of a writing in actions of covenant "was a rule of the civil law transplanted into the common law"). In this process, there was little borrowing of terms like *emphyteusis* or *locatio rei* in the English terminology, although not none at all. For a similar pattern in the Yearbooks, see David J. Seipp, *Roman Legal Categories in the Early Common Law*, in Thomas G. Watkin, ed, *Legal Record and Historical Reality* 9, esp 27-34 (Hambleton 1989).

²⁸² 25 Edw III, st 5, ch 2 (1351), in 1 *Statutes of the Realm* 319-20 (1810). See J.G. Bellamy, *The Law of Treason in England in the Later Middle Ages* 1-3 (Cambridge 1970).

²⁸³ The connection was made by Edward Coke, 2 *The First Part of the Institutes of the Laws of England; or, A Commentary upon Littleton* 176b-177a (W. Clarke 1817) ("And this is that in effect, which the civilians call *collatio bonorum*.").

²⁸⁴ William Jones, *An Essay on the Law of Bailments* 11 (London 1781, Byrne 2d ed 1804).

²⁸⁵ Samuel E. Thorne, *Henry de Bracton 1268-1968* 10 (Exeter 1970).

English lawyers have used civilian terminology to describe institutions that were fundamentally different from those they were describing.²⁸⁶ One cannot, therefore, reject out of hand the possibility of influence simply because Magna Carta's text did not use the language of the civil law in the same way we find that language used in *Bracton*.

CONCLUSION

A balance of probabilities is all one can expect on the subject of this inquiry in comparative legal history. However, lack of definitive proof is not just cause for despair. It is not even just cause for silence. Some uncertainty on this score is by no means an unusual state of affairs for a medieval historian. Very often explanations of historical causation cannot be proved with certainty, and this is particularly true for periods where the sources are as few and as uninformative as they are for the events surrounding the drafting of Magna Carta. All historians are bound to draw conclusions from what is available.

It is of course beyond doubt that causal connections between different sources are sometimes made too readily.²⁸⁷ Perhaps this inquiry has trespassed beyond the realm where anything can be demonstrated. Some of the arguments made about individual chapters are undoubtedly stronger than others, and the fact that there was merely occasional use of civilian terminology in Magna Carta's chapters undeniably makes this Article's thesis harder to accept than it would be had the texts of Roman and canon law been copied verbatim. One cannot suppose that a wholesale "reception" of Continental law occurred.

This said, the cumulation of the evidence must count in favor of supposing the existence of influence coming from the *ius commune* on several of the chapters of Magna Carta. The supposition is plausible. More than that, it is useful. It renders the existence of the parallels, both substantive and verbal, between so many of the chapters of Magna Carta and the rules of the *ius commune* easier to understand. It helps to explain otherwise puzzling aspects of the Charter—both in what was omitted and what was included. It offers an explanation for some of the chapters that were excluded in reissues of the charter. And it fits the pattern of

²⁸⁶ The most obvious example is *dos* or dower. See Loengard, 'Of the Gift of her Husband' at 216 (cited in note 75) ("In 1200 *dos* in England shared little more than a Latin name with the Roman law institution familiar on the European continent."). See also Maitland's comment about Bracton in Pollock and Maitland, 1 *History of English Law* at 207 (cited in note 28).

²⁸⁷ Quentin Skinner, *The Limits of Historical Explanations*, 41 *Philosophy* 199 (1966).

lawmaking that was common throughout Western Europe at the time. Selective incorporation of the *ius commune* was the norm; on the Continent the learned laws were similarly adapted to fit local conditions.

All in all, it looks as though there was some hard thought—perhaps even some hard bargaining—about the Charter's terms.²⁸⁸ That process continued when it came time for the Charter to be revised. The chapters in their 1215 form were not always satisfactory in the sense of meshing easily with existing law and practice. A few of them made little or no sense in the context of the English common law. It was natural therefore that subsequent reissues of the Charter should change some of its provisions, including some of those that had been incorporated from the *ius commune*. Little of it was regarded as beyond touching.²⁸⁹

W.L. Warren has observed that Magna Carta was “the work of many hands and influences.”²⁹⁰ What this Article has attempted to show is that there are reasons for thinking that some of these hands and some of these influences were connected with the *ius commune*. If the evidence presented is convincing on this score, it is a very short step to conclude that the *ius commune* had a significant effect on the final product. The sum of the argument being made here is that, in this most basic statement of English customary law and constitutional principle, it requires no giant stretch of the imagination to think that the resources of the *ius commune* played a part.

²⁸⁸ The habit of bargaining over terms was already in place in 1215, and it continued afterwards. See J.R. Maddicott, *Magna Carta and the Local Community 1215-1259*, 102 *Past & Present* 25, esp 29 (1984).

²⁸⁹ On this characteristic feature of the medieval use of Roman law, see David Johnston, *The General Influence of Roman Institutions of State and Public Law*, in David L. Carey Miller and Reinhard Zimmermann, eds, *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* 87, 95-97 (Duncker & Humblot 1997).

²⁹⁰ Warren, *King John* at 240 (cited in note 26). See also Helen Maud Cam, *The Legislators of Medieval England*, in *Law-Finders and Law-Makers in Medieval England: Collected Studies in Legal and Constitutional History* 132 (Merlin Press 1962); Hudson, *The Formation of the English Common Law* at 227 (cited in note 26).

